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No. 98 614

In The
Supreme Court of the United States
October Term, 1998

IN RE: CHARLES A. MUER
ESTATE OF CHARLES A. MUER, DECEASED,
Petitioner,
C.A. MUER CORPORATION,
Plaintiff,

v.

ROBERT A. KARBEL,
PERSONAL REPRESENTATIVE OF THE ESTATE OF
GEORGE F. DRUMMEY AND LYNNE DRUMMEY,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI
with Appendix

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QUESTION PRESENTED

Does the district court in an action under the Limitation of Liability Act, 46 U.S.C. § 181, *et. seq.*, have the power to determine whether the substantive law of DOHSA applies?

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Supplemental Rules for Certain Admiralty and Maritime Claims, Rule F 9

Petitioner Estate of Charles A. Muer, Deceased (hereafter, "petitioner"), respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at *Estate of Muer v. Karbel*, 146 F3d 410 (6th Cir. 1998) (App. A.). The opinions of the district court filed March 14, 1996 (App. B) and July 31, 1996 (App. C) are not published.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on June 9, 1998. The Court of Appeals denied a timely petition for rehearing on July 16, 1998. (App. D).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved in this petition are set forth verbatim below.

28 U.S.C. § 1333

Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as a prize.

46 U.S.C. § 183

Amount of liability

(a) Privity or knowledge of owner; limitation

The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel,

or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the case provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

(b) Seagoing vessels; losses not covered in full

In the case of any seagoing vessel, if the amount of the owner's liability as limited under subsection (a) of this section is insufficient to pay all losses in full, and the portion of such amount applicable to the payment of losses in respect of loss of life or bodily injury is less than $420 per ton of such vessel's tonnage, such portion shall be increased to an amount equal to $420 per ton, to be available only for the payment of losses in respect of loss of life or bodily injury. If such portion so increased is insufficient to pay such losses in full, they shall be paid therefrom in proportion to their respective amounts.

(c) Tonnage of seagoing vessels

For the purposes of this section the tonnage of

a seagoing steam or motor vessel shall be her gross tonnage without deduction on account of engine room, and the tonnage of a seagoing sailing vessel shall be her registered tonnage: *Provided*, That there shall not be included in such tonnage any space occupied by seaman or apprentices and appropriated to their use.

(d) Loss of life or bodily injury arising on distinct occasions

The owner of any such seagoing vessel shall be liable in respect of loss of life or bodily injury arising on distinct occasions to the same extent as if no other loss of life or bodily injury had arisen.

(e) Privity imputed to owner

In respect of loss of life or bodily injury the privity or knowledge of the master of the seagoing vessel or of the superintendent or managing agent of the owner thereof, at or prior to the commencement of each voyage, shall be deemed conclusively the privity or knowledge of the owner of such vessel.

(f) "Seagoing vessel" defined

As used in subsections (b), (c), (d), and (e) of this section and in section 183b of this title, the term

"seagoing vessel" shall not include pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels or their tenders, self-propelled lighters, nondescript self-propelled vessels, canal boats, scows, car floats, barges, lighters, or nondescript non-self-propelled vessels, even though the same may be seagoing vessels within the meaning of such term as used in section 188 of this title.

46 U.S.C. § 761

Right of action; where and by whom brought

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

STATEMENT OF THE CASE

A. Introduction

This case involves the power of a district court hearing an action under the Limitation of Liability Act (LOLA), 46 U.S.C. § 181 *et. seq.*, to decide which substantive law applies.

Petitioner filed a motion for partial summary judgment asking the district court to rule the action was governed by the Death on the High Seas Act (DOHSA), 46 U.S.C. § 761 *et. seq.*, based on facts admitted by Robert A. Karbel, personal representative of the Estate of George F. Dummey and Lynne Drummey (hereafter, "claimant"), and his expert witness. Claimant responded to the motion by filing his own motion for summary judgment asking the district court to rule as a matter of law that LOLA did not apply. Claimant conditionally offered as an alternative, only in the event the court did not grant his motion for summary judgment, certain stipulations necessary for the stay of state court proceedings to be lifted. The district court denied claimant's motion for summary judgment, granted petitioner's motion for partial summary judgment (holding that DOHSA applies), and lifted the stay of state court proceedings based on

claimant's proffered stipulations.

The United States Court of Appeals for the Sixth Circuit, in a 2-1 opinion, reversed in part and held the district court abused its discretion in deciding that DOHSA provided the applicable substantive law. The majority considered that a "non-LOLA" issue and held the district court was bound to defer to the state court based on the claimant's stipulations, even though the stipulations were offered only conditionally, as a backup position, and were not offered until after the substantive law issue was raised by petitioner's first motion.

Petitioner respectfully submits the choice of whether DOHSA or general maritime law applies to this case was necessary to the proceedings under LOLA, and that the district court had full authority to decide that question. The result of the Sixth Circuit's opinion is that a claimant in a LOLA case can control which issues a district court will decide merely by filing a conditional offer to make stipulations for the lifting of the stay of state court proceedings.

B. Factual Background

On March 13, 1993, the pleasure sailing vessel "Charley's Crab" sank in a storm in the Atlantic Ocean off the coast of Florida. On board were Charles and Betty Muer and George and Lynne Drummey, long-

time friends who were returning from a vacation in the Bahamas. The boat had been owned by Charles Muer until just before the final voyage, at which time it was transferred to the C. A. Muer Corporation. Mr. Muer was the majority shareholder of the corporation. Neither the passengers nor the boat have been found.

C. Procedural Background

In December, 1994 Robert A. Karbel, the personal representative of both the Drummey estates, filed this wrongful death action against the Estate of Charles A. Muer and the C. A. Muer Corporation in the Circuit Court for the County of Wayne, Michigan. Counts I and III of the complaint sought recovery under general maritime law, alleging the accident happened within Florida's territorial waters. Count II alleged alternatively that if the accident occurred more than one marine league from the coast of Florida, the Drummey estates were entitled to damages pursuant to DOHSA. These are mutually exclusive theories. The general maritime law action is applicable only if the deaths occurred within the territorial waters of any state, *Moragne v. State Marine Lines, Inc.*, 398 U.S. 375, 401, 90 S. Ct. 1772, 26 L Ed 2d 339 (1970), while DOHSA would provide the exclusive remedy if the deaths occurred more than one marine league from shore, *Mobile Oil Corp. v. Higginbotham*, 438 U.S. 618,

98 S. Ct. 2010, 56 L Ed 2d 581 (1978), *Offshore Logistics v. Tallentire*, 477 U.S. 207, 106 S. Ct. 2485, 91 L Ed 2d 174 (1986).

In April, 1995, the Muer estate and the C. A. Muer Corporation filed a complaint for exoneration from or limitation of liability in the United States District Court for the Eastern District of Michigan, Southern Division, Docket No. 95 CV 7176. The action was filed pursuant to LOLA and the Supplemental Rules for Certain Admiralty and Maritime Claims, Rule F. By stipulation of the parties in July, 1995, claimant intervened in the LOLA action and filed a copy of the state court complaint as his claim. In August, 1995, the district court issued a stay of the state court proceedings, except that it allowed existing and continuing discovery to be applicable in both cases. Both parties thereafter continued to engage in discovery in the LOLA case.

While the LOLA action was pending in the district court, a settlement was reached between claimant and C. A. Muer Corporation. The corporation was dismissed as a party.

During discovery, claimant admitted he could not establish that the boat sank within a marine league from shore:

> *"We do not believe at this time that we can establish that the vessel sank within one marine league of the Florida coast.*

> *It is more likely that is was in the neighborhood of four to five marine leagues."*

Further, claimant's expert, James Allen, conceded in his deposition on November 2 and 3, 1995 that it was his opinion the vessel sank more than one marine league from shore.

On November 17, 1995, petitioner filed a motion for partial summary judgment. The motion sought summary judgment on the entire general maritime claim because there was not sufficient evidence that the deaths occurred within a marine league from shore, and therefore a required element of the general maritime claim was missing. The motion also sought partial summary judgment on the DOHSA claim, because DOHSA limits the damages recoverable to pecuniary loss, and claimant admitted in answers to interrogatories that there was no pecuniary loss.

On December 8, 1995, claimant responded by filing his own motion for summary judgment, or in the alternative, motion to lift stay of state court proceedings. Claimant requested the district court to grant summary judgment on the entire LOLA case because Charles Muer was on board the vessel at the time of the accident and therefore the lack of "privity or knowledge" required to limit liability pursuant to 46 U.S.C. § 183(a) was an impossibility. As alternative

relief, if the district court did not grant summary judgment on the merits, claimant offered certain "stipulations" that would preserve the admiralty court's jurisdiction to decide issues under LOLA and allow the stay of state court proceedings to be lifted. See *Langnes v. Green*, 282 U.S. 531, 51 S. Ct. 243, 75 L Ed 520 (1931) and, e.g., *Gorman v. Cerasia*, 2 F3d 519 (3rd Cir. 1993), for a description of the stipulation process. At no time did claimant unconditionally make or offer stipulations necessary to lift the stay of state court proceedings; the proffered stipulations would take effect if and only if the district court denied claimant's motion for summary judgment. (App. E). Petitioner objected to the adequacy of the proffered stipulations in his answer to claimant's motion for summary judgment dated January 4, 1996, pp. 17-19.

D. The District Court's March 14, 1996 Opinion and Order

The motions were heard on February 1, 1996. Claimant argued the court should not hear petitioner's motion, but instead should either dismiss the LOLA case per claimant's summary disposition motion or remand the matter to state court pursuant to the conditional stipulations. (App. F). The court did hear all of the motions and took the matter under advisement.

On March 14, 1996, the court issued an opinion and order. (App. B). The court denied claimant's motion for summary judgment, finding that Mr. Muer's presence on the boat at the time of the accident did not preclude the LOLA action. It further granted petitioner's motion, finding there was no genuine issue of material fact that the boat went down more than a marine league from the coast of Florida, and thus DOHSA was the governing law. The court therefore granted petitioner's summary judgment and ruled that claimant did not have a valid claim based on general maritime law. The court also granted partial summary judgment in favor of petitioner on the DOHSA claim on the basis that DOHSA limits the damages recoverable to pecuniary loss, and claimant had admitted in answers to interrogatories that there was no pecuniary loss. That ruling was never challenged on appeal. Finally, the court accepted claimant's offered stipulations and ordered that the stay of state court proceedings be lifted.

With respect to claimant's assertion that the court was bound to rule only on his later-filed motion and could not rule on petitioner's first-filed motion, the court stated:

> *"...Claimant contends that it would be improper for the court to rule on Petitioner's motion while Claimant's later-*

filed motion for summary judgment is pending.

***

Claimant's argument that this motion should be reserved to the state court is without merit, as the case is properly before this court and the issues have been fully briefed and argued. In the interest of judicial economy, this court will rule on Petitioner's motion." (App. B, pp. 35a, 36a).

E. Remaining Issues in the District Court

The court's ruling left as the only issue in the case claimant's potential entitlement to damages for the decedents' pre-death conscious pain and suffering, an issue which at that time had not been decided by the Sixth Circuit or by this Court. In April, 1996, petitioner filed a motion asking the court to rule as a matter of law that in a case governed by DOHSA, damages for the decedents' conscious pain and suffering are not permitted. Later in April, the Sixth Circuit issued its decision in *Bickel v. Korean Airlines*, 83 F3d 127 (6th Cir. 1996), holding that pre-death pain and suffering damages are not recoverable in a case governed by DOHSA.

In May, 1996, claimant filed a motion to dismiss

petitioner's motion on the basis that, since the stay had been lifted, the state court was the only forum to decide the question whether pain and suffering damages were potentially available. Claimant expressly admitted that by forcing the matter to be heard in state court, he hoped to avoid the Sixth Circuit precedent in *Bickel*. Claimant's motion also asserted there was "newly discovered evidence" raising the possibility that the boat had come within three miles of shore, and that the district court should therefore overturn its March 14, 1996 opinion and order holding that DOHSA was the applicable law.

The motions were heard on June 26, 1996. On July 31, 1996 the court entered an opinion and order concluding that claimant's alleged evidence was speculative, and that claimant could not establish the required elements of an action under general maritime law. The court further ruled based on *Bickel*, *supra*, that claimant could not recover for the decedents' alleged concious pain and suffering. With regard to claimant's motion to dismiss petitioner's motion for summary judgment, the court held:

> *"Claimant's argument that the state court is a better forum in which to decide the instant issue was unpersuasive for the same reason it was unpersuasive when claimant had previously wanted the state, rather than the federal, court to rule: this*

court has retained jurisdiction over the case throughout, has been fully apprised of the issues, and has the power to rule on these issues. In addition, as of April 29, 1996, there is clear and unequivocal Sixth Circuit precedent in the case Bickel v. Korean Airlines Company, Ltd., 83 F3d 127 (6th Cir. 1996), which is directly on point to the issue raised in the estate's motion for summary judgment. Therefore, for reasons of judicial economy, the court will deny claimant's motion to dismiss the estate's motion for summary judgment." (App. C, p. 46a).

F. The Sixth Circuit's Decision

Claimant filed a timely appeal in the United States Court of Appeals for the Sixth Circuit. At about the same time that appeal was filed, the Sixth Circuit issued a second opinion in *Bickel v. Korean Airlines Co., Ltd.* 96 F3d 151 (6th Cir. 1996), vacating that portion of its opinion which had held conscious pain and suffering damages were not permitted in a DOHSA case. That ruling was based on a procedural point that the issue had not been properly preserved. While the present case was pending in the Sixth Circuit (actually, one day before the Sixth Circuit opinion was issued),

this Court released its opinion in *Dooley v. Korean Airlines* Co., Ltd., 118 S. Ct. 1890; 141 L.Ed. 2d 102 (1998), holding that a decedent's alleged damages for conscious pain and suffering are not recoverable in a case governed by DOHSA.

On June 9, 1998 the Sixth Circuit issued a published opinion authored by Judge Cole and joined by Judge Daughtrey, with Judge Contie concurring in part and dissenting in part. All three judges agreed the district court was correct in denying claimant's motion for summary judgment on privity/knowledge issue. The majority further held the district court abused its discretion in deciding petitioner's partial motion for summary judgment and later motion for summary judgment because the issues raised in those motions were "non-LOLA" issues. The court held that in view of the stipulations offered by claimant, the district court did not have the power to rule on petitioner's motions. The Sixth Circuit lumped together the rulings on both motions filed by petitioner, even though the first motion was filed before claimant offered his conditional stipulations, and even though claimant never argued in the Sixth Circuit that the district court abused its discretion in deciding the first motion. Judge Contie dissented, holding the district court clearly had jurisdiction to decide the issues raised by petitioner's motions, and that considerations of judicial economy strongly favored a decision by the district court.

Petitioner filed a timely petition for rehearing which was denied by order entered July 16, 1998.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION OF THE SIXTH CIRCUIT CONFLICTS WITH RULINGS OF THIS COURT AND THE COURT OF APPEALS WHICH RECOGNIZE IT IS PROPER, EVEN REQUIRED, FOR THE DISTRICT COURT IN A LOLA PROCEEDING TO DECIDE THE THRESHOLD ISSUE OF WHICH SUBSTANTIVE LAW APPLIES.

A. Precedent from this Court and the Sixth Circuit supports the LOLA court's proper role to determine which substantive law applies.

The Sixth Circuit ruled the district court abused its discretion in reaching the substantive law issues, saying at various points the district court's decisions were "beyond the LOLA action" (App. A, p. 18a); "outside the LOLA action" (*Id*, p. 22a); "ancillary to the LOLA action" (*Id*, p. 16); and "pertaining to non-LOLA matters" (*Id*, p. 22a).

The Sixth Circuit's decision is contrary to *Black Diamond Steamship Corp. v. Robert Stewart and Sons*,

Ltd., 336 U.S. 386, 397-398; 69 S. Ct. 622, 93 L Ed 754 (1949), where this Court held the district court in a LOLA proceeding must decide which substantive law applies. The question which the Court directed the district court to decide was whether a certain international convention that had been ratified by Belgium governed limitation where the collision occurred in Belgian waters. This Court held:

> *"It is important to add, moreover, that the question of what law governs the substantive limit of liability should be determined upon remand in advance of the proof of individual claims. A proceeding to limit liability is ipso facto a proceeding to limit recovery, and the amount of the applicable limit, like the value of the vessel and freight, is a question affecting the magnitude of the res from which recovery is sought. It is a question, therefore which lies at the threshold of all claims, is equally relevant to all, and should be accordingly disposed of before any."*

The clear message of *Black Diamond* is that the LOLA court must ascertain as a threshold matter which law applies.

In *In re Complaint of Bethlehem Steel Corp.*, 631 F2d 441 (6th Cir. 1980), the Sixth Circuit cited *Black Diamond* (631 F2d at 444, n4), and held the district court in a LOLA action had properly decided the question of which substantive law applied. The substantive law in question dealt specifically with whether certain claimants had a potential right to recover damages, i.e., whether damages were recoverable for the detention of vessels which suffered no physical injury.

That is exactly what the district court in the present case did when it granted petitioner's motion for partial summary judgment and determined that DOHSA applies. The determination whether DOHSA or general maritime law governs cannot be a "non-LOLA" issue, because resolution of that issue is essential to proceeding with the two-step inquiry required by LOLA. As the Sixth Circuit noted at page 13 of its opinion, in an "adequate fund"[1] situation (where the value of the limitation fund exceeds the aggregate value of claims), LOLA is unnecessary; however, to decide that threshold question one must first know what body of admiralty law is applicable so the value of the claims

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[1]The district court ruled that the value of the vessel did not exceed $500 and claimant's counsel in argument before the district court conceded the value of the vessel was zero as a practical matter.

can be determined. For example, assume a limitation fund of $100,000. Assume further there are claims for pecuniary loss totaling $50,000, but that claims for non-economic loss, such as loss of society and companionship, far exceed the limitation fund. If DOHSA applies, the total value of the claims is less than the fund and there is no need for a concursus under LOLA. But if general maritime law applies the fund is inadequate and the LOLA two-step inquiry must proceed. This example shows how an early determination of whether DOHSA applies is proper, and even essential under LOLA. To delay determining the applicable substantive law could result in the totally wasted effort of an exoneration or liability trial only to discover there are no damages recoverable.

The present case is a variation of the above hypothetical set of facts. In this case there was no economic loss according to claimant's own admissions. If DOHSA applies there are no recoverable damages and petitioner is entitled to a judgment of exoneration in the LOLA action.[2]

As this Court recognized in *Black Diamond*, *supra* and the Sixth Circuit recognized in *Bethlehem*

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[2]A judgment of exoneration includes a finding of no legal liability and is expressly provided for in Supplemental Rule F, as the Sixth Circuit stated in its opinion at page 11, n3. (App. A, p. 17a).

Steel, the determination of the extent of potential liability is unquestionably part of the LOLA proceeding. See also, Supplemental Rule F(a), which requires the district court to determine damages, and *In Re Central RR Company of New Jersey*, 73 AMC 222 (3rd Cir. 1973), holding the LOLA court has exclusive jurisdiction to determine damages and to apportion the limitation among the various claimants. This mandate cannot be carried out unless the amount which claimants are potentially entitled to recover is first determined, and that question can only be answered by deciding whether DOHSA applies.

B. Claimant's conditional stipulations did not deprive the district court of the power to determine the applicable substantive law.

It appears the Sixth Circuit's holding that the district court exceeded its role under LOLA was based on the conditional stipulations offered by claimant in response to petitioner's motion for partial summary judgment:

> *"The district court overstepped its bounds by reaching issues ancillary to the LOLA action when the claimant-appellant stipulated to the district court's jurisdiction of the LOLA action."* (App. A, pp. 24a-

25a, footnote omitted).

These stipulations, however, were offered after petitioner filed its first motion on November 17, 1995. They were not offered unconditionally, but were only a secondary position in the event the district court did not accept claimant's argument that the entire action should be dismissed on its merits.

Claimants could have responded immediately to the LOLA petition and/or petitioner's motion for summary judgment by filing unconditional stipulations that would have preserved the district court's jurisdiction to decide all issues pertaining to LOLA. See *Langnes v. Green*, *supra*. Instead, claimant expressly invoked the district court's jurisdiction and mounted a direct attack on petitioner's right to seek relief under LOLA. Winning that motion would have forever put to rest the district court's jurisdiction in this case.

To say a district court abuses its discretion by deciding a previously-filed motion once a claimant responds by making conditional stipulations would hold the court and the petitioner hostage to the claimant's strategy. It would give the claimant control over which motions the district court decides. That is exactly what claimant attempted to do here, when he argued at the February 1, 1996 hearing that the court should either grant his motion for summary judgment and dismiss

the entire LOLA case or remand the matter back to state court based on the conditional stipulations, but in no event should the court decide petitioner's first-filed motion. (App. F).

The Sixth Circuit's decision erroneously destroys the district court's discretion to hear and decide properly filed motions in a LOLA case. Since claimant asked the district court to rule on his motion for summary judgment, the district court clearly had discretion to decide petitioner's previously-filed motion as well. Any other rule would give the claimant the power to unilaterally pick and choose which motions the district court has the power to decide. The procedure authorized by this Court in *Langnes v. Green* does not contemplate such a result.

C. The district court had discretion to decide motions subsequently filed by both parties.

The district court did not abuse its discretion in deciding the motions filed after the March 14, 1996 order. At that point the only remaining issue was whether claimant could potentially recover damages for the decedents' alleged conscious pain and suffering. Since the district court was well familiar with the case and since this was purely a legal issue on which there was controlling authority from the Sixth Circuit at the time (and on which there is now controlling authority

from this Court), petitioner presented that issue to the district court by way of a motion for summary judgment filed in April, 1996. In May, 1996 claimant responded with a motion to dismiss petitioner's motion. Significantly, claimant also sought further relief in the district court by asserting the court should reverse its March 14, 1996 order based on alleged newly discovered evidence (which was actually only a recasting of old evidence). Therefore, claimant voluntarily submitted himself to the jurisdiction of the district court.

The district court in its July 31, 1996 opinion ruled it had jurisdiction to decide both parties' motions, and judical economy demanded that it rule.

As noted, this Court in *Dooley v. Korean Air Lines, supra*, has now decided that damages for conscious pain and suffering are not recoverable under DOHSA. That leaves only the question of whether the district court had the power to rule on claimant's newly discovered evidence motion, a question easily answered because it was claimant who chose to file the motion in the LOLA court. Having invoked the district court's jurisdiction to decide the matter, claimant cannot escape the court's ruling by asserting it had no power to act.

Further, decisions of this Court and the Fifth Circuit, as well as concerns of judicial economy, strongly support the district court's power to make

these rulings. In *Hartford Accident & Indemnity Co v Southern Pacific Company*, 273 US 207; 47 S Ct 357; 71 L Ed 612 (1927), the question was whether the admiralty court had the power to make binding rulings in a LOLA case after the court had ruled on the petition to limit. This Court rejected the argument that the admiralty court was without power to grant relief apart from granting or denying the petition to limit liability:

> *"The parties, it is argued, must thereafter [after the petition was denied] be remitted to a common law or equity court of the State to secure their rights.*
>
> * * *
>
> *"Surely the admiralty court, in view of the large powers intended to be given it in such a proceeding, is not so helpless as this. So to hold would be to hold that, unless the petitioner wins, the court does not have power to administer justice. There is nothing in the statute, nor in the rules, that requires so feeble a conclusion.*
>
> * * *
>
> *"Such a conclusion is quite in accord with the rules governing equity procedure in general conformity with which this limitation of liability statute has been*

> *construed in the courts. Where a court of equity has a obtained jurisdiction over some portion of a controversy, it may and will in general proceed to decide all the issues and award complete relief, even where the rights of parties are strictly legal and the final remedy granted is of the kind which might be conferred by a court of law."* 273 US at 216-218.

See also, *Pershing Auto Rentals, Inc v Gaffney*, 279 F2d 546, 552 (5th Cir, 1960), recognizing the "acknowledged power of the admiralty court to adjudicate the whole case and grant full relief even though limitation is denied".

Judicial economy strongly favored a decision by the district court, which had already decided other aspects of the case and was fully familiar with the factual and procedural background, whereas the parties had never been before the state court on this case. The issues raised were governed by admiralty law and most of the precedent involved was from the federal courts.

Respectfully, the decision of Judge Contie, dissenting on this issue, is more consistent with authority from this Court. After recognizing that the district court clearly had jurisdiction, Judge Contie stated:

> *"Judicial economy strongly favored a decision by the district court, because the court was familiar with the underlying issues and the factual and procedural background."* See generally *Pershing Auto Rentals, Inc. v. Gaffney,* 279 F2d 546, 552 (5th Cir. 1960) (recognizing the 'acknowledged power of the admiralty court to adjudicate the whole case and grant full relief')." (App. A, p. 27a).

CONCLUSION

The Sixth Circuit's decision creates a severe and unwarranted restriction on the LOLA court's ability to decide which substantive law applies to the LOLA proceeding and to deal with the case in a way that furthers judicial economy. The opinion directly contradicts this Court's decision in *Black Diamond*, *supra*, which recognizes the issue of which substantive law applies in a LOLA case is a threshold matter that should be decided early on in the proceedings. If the Sixth Circuit's decision is allowed to stand, district courts in LOLA cases will be placed in an unconscionable box, precluded from exercising discretion to decide properly filed motions whenever the claimant makes a conditional offer to stipulate to preserve the LOLA court's jurisdiction. Respectfully,

such a result is contrary to the intent of *Langnes* and other cases recognizing the stipulation procedure.

Under authority from this Court and other circuits, the district court has the power to decide all issues which touch on LOLA proceedings. The district court did not abuse its discretion in deciding these issues. Accordingly, the decision of the Sixth Circuit should be reversed and the case should be remanded to that court to decide the merits of the remaining issues raised by claimant.

Petitioner respectfully requests the Court to grant this petition or to grant such other relief as the Court determines to be appropriate.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OPINION

Sixth Circuit Case Nº. 96-2111
Filed June 9, 1998

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APPENDIX A: Opinion of the United States Court of Appeals for the Sixth Circuit Filed June 9, 1998.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: Charles A. Muer.

ESTATE OF CHARLES A. MUER,
Deceased,

Plaintiff-Appellee, **No. 96-2111**

C.A. MUER CORPORATION,

Plaintiff,

-v-

ROBERT A. KARBEL, Personal
Representative of the Estate
of George F. Drummey and
Lynne Drummey,

Intervenor-Appellant

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit
No. 95-71761--John Corbett O'Meara, District Judge

Argued: October 28, 1997

Decided and Filed: June 9, 1998

Before: CONTIE, DAUGHTREY, and COLE, Circuit Judges

COUNSEL

ARGUED: Jeffrey T. Stewart, SEIKALY & STEWART, Southfield, Michigan, for Appellant. John L. Coté, WILLINGHAM & COTÉ, East Lansing, Michigan, for Appellee. **ON BRIEF**: Jeffrey T. Stewart, SEIKALY & STEWART, Southfield, Michigan, for Appellant. John L. Coté, Curtis Hadley, WILLINGHAM & COTÉ, East Lansing, Michigan, Norbert B. Leonard, LEONARD, KRUSE & ZLATOPOLSKY, Bloomfield Hills, Michigan, for Appellee.

COLE, J., delivered the opinion of the court, in which DAUGHTREY, J., joined. CONTIE, J. (pp. 17-18), delivered a separate opinion concurring in part and dissenting in part.

OPINION

R. GUY COLE, JR., Circuit Judge. This case involves a petition by a vessel owner for a limitation of liability under the Limitation of Liability Act ("LOLA"), a federal statute intended to limit the liability of vessel owners who are not negligent and have no privity to or knowledge of the negligent cause of a maritime accident. The petition was filed in federal court in response to a wrongful death action which was asserted under general maritime law, and alternatively under the Death on the High Seas Act ("DOHSA"), in Michigan state court. The appeal raises several issues: (1) whether the district court erred by not granting the claimant-appellant summary judgment on the entire LOLA action; (2) whether the district court erred in granting the petitioner-appellee partial summary judgment on the appellant's general maritime claim; (3) whether the district court erred in not setting aside its order granting partial summary judgment on the maritime claims; (4) whether the district court erred in reaching a DOHSA question in the context of this LOLA action; and (5) whether the district court erred in deciding that DOHSA is an exclusive remedy and precludes any award of damages for pre-death pain and suffering.

For the following reasons, we affirm the district court in part and reverse and remand in part.

FACTS AND PROCEDURAL HISTORY

This case arises from a wrongful death action which was initiated following the accidental sinking of a pleasure boat in a storm off the Florida coast on March 13, 1993. On the boat when it sank were four individuals: Charles Muer, his wife Betty Muer and George and Lynne Drummey ("the Drummeys"). Charles Muer was the founder and principal stockholder of C.A. Muer Corporation, a restaurant enterprise with locations in Florida and Michigan. The boat was owned by Charles Muer until just before the final voyage at which time it was transferred to the C.A. Muer Corporation. Charles Muer was the captain of the vessel on its voyage.

Robert A. Karbel ("Karbel," "claimant" or "appellant"), personal representative of the Drummey's estate, filed a wrongful death action under general maritime law, and alternatively under DOHSA, in Michigan state court in December 1994.

The defendants in the state case, the Estate of Charles A. Muer ("Muer estate," "appellee" or

"petitioner") and C.A. Muer Corporation, filed a complaint in federal court in Michigan in April 1995, seeking exoneration or limitation of liability under the Limitation of Liability Act ("LOLA"), 46 U.S.C. § 181 *et seq*. The district court permitted Karbel to intervene in the federal action and stayed the state court proceedings in August 1995. In October 1995, Karbel filed an answer to the Muer estate's petition together with a claim that was identical to the state court complaint.

In November 1995, the Muer estate moved for partial summary judgment on the basis that the claimant had not come forward with sufficient evidence to establish that the accident happened within one marine league of shore, a required element of the claimant's general maritime claim, and therefore the claim could not survive summary judgment. In the same motion, the Muer estate contended that DOHSA applied to the case because of the location of the accident, and that the district court should grant the estate partial summary judgment as to the wrongful death damages under DOHSA because the claimant had already asserted that there were no economic losses. The Muer estate explicitly did not seek summary judgment with respect to the claims for the decedent's pain and suffering.

In December 1995, Karbel moved for summary judgment dismissing the complaint for limitation, claiming that limitation of liability was only intended to protect vicarious defendants and that his allegations involved active negligence by the defendants. Karbel also submitted a motion to stay the federal court proceedings and to lift the stay of the state court proceedings so he could proceed in the state court action. Accompanying Karbel's motion was an "Offer to Stipulate to Jurisdiction and other Matters in Connection with Stay of Proceedings."

In a March 14, 1996 order, the district court ruled that (1) the claimant did not produce evidence sufficient to support a factual finding that the boat accident occurred inside of one marine league (three miles) of shore and thus the petitioner was deserving of a summary judgment on the general maritime claims because DOHSA necessarily governed the case if the accident did not occur within one marine league of the Florida shore; (2) DOHSA barred noneconomic damages (but specifically reserved the issue of conscious pain and suffering damages as a supplement to remedies under DOHSA); (3) Karbel's allegations of active negligence did not bar the LOLA action; and (4) lifting the stay of the state court proceedings, pursuant to Karbel's stipulation that the district court retained continuing jurisdiction to decide

the limitation of liability questions raised in the Muer estate's federal complaint.

On April 26, 1996, the Muer estate filed another summary judgment motion seeking a ruling on the remaining issue, the conscious pain and suffering claims. On April 29, 1996, this court issued a decision in *Bickel v. Korean Airlines Co., Ltd.*, 83 F.3d 127 (6th Cir. 1996), in which it held that DOHSA barred conscious pain and suffering damages as a supplement to DOHSA's remedies.

On May 2, 1996, Karbel moved for dismissal of the Muer estate's summary judgment motion on the basis that the district court had lifted the stay of the state court proceedings and that the only proper place to litigate issues not particular to limitation of liability was the state court. At the same time, Karbel moved to set aside the district court's March 14, 1996 order to the extent that it held that as a matter of law the vessel had sunk more than three miles from shore. Karbel argued that allegedly newly discovered evidence relative to the speed of the vessel made it possible that the boat had reached a point within three miles of shore.

The district court entered an order on July 31, 1996, concluding that evidence was speculative

whether the boat had reached a marine league from shore prior to sinking and dismissed Karbel's motion after concluding that there were still no genuine issues of material fact and that the Muer estate was deserving of judgment as a matter of law. It thereby ruled that DOHSA should continue to govern the case.

In that same order, the district court ruled on other remaining pending motions. It held that (1) deference to the state court on the issues presented by the petitioner's pain and suffering summary judgment motion was not necessary; (2) pursuant to this court's decision in *Bickel*, DOHSA barred the conscious pain and suffering claims; and (3) because there were no other damage claims, the appellee was entitled to final judgment. Karbel subsequently filed this appeal.

On August 29, 1996, the *Bickel* panel substituted a new opinion, vacating the portion which had held that conscious pain and suffering damages are non-recoverable under DOHSA. *See Bickel v. Korean Air Lines Co., Ltd.*, 96 F.3d 151, 154 (6th Cir. 1996) ("*Bickel II*"), *cert. denied*, 117 S. Ct. 770 (1997). After the second *Bickel* opinion, Karbel filed a motion for remand or other relief with this court on the basis that it might be preferable to have the district court first address the legal question of recoverability of pain and

suffering damages. In November 1996, this court denied Karbel's motion for remand.

DISCUSSION

A. An Overview of LOLA

The Limitation of Liability Act ("LOLA"), originally enacted in 1851, permits a vessel owner to limit its liability to the value of the vessel and its then pending freight, provided that the loss or damage is incurred without the "privity or knowledge" of the owner. The Act was passed "to encourage ship building and to induce capitalists to invest money in this branch of industry." *Norwich & N.Y. Transp. Co. v. Wright*, 80 U.S. 104, 121 (1871). The Act achieves this purpose by "exempting innocent shipowners from liability, beyond the amount of their interest." *Id.* When faced with liability for a maritime accident, a vessel owner may file a petition in federal court seeking limitation of liability under LOLA. Provided that the accident in question occurred without the owner's "privity or knowledge," LOLA limits the owner's liability to the value of his interest in the vessel and its pending freight. 46 U.S.C. § 183(a).

After the vessel owner deposits with the district court an amount representing the value of the vessel

and its freight ("limitation fund"), the district court stays all related claims against the vessel owner pending in any forum and directs all potential claimants to file their claims with the district court within a specified time. 46 U.S.C. § 185; Supp. R. for Certain Admiralty and Maritime Claims F(3), F(4); *see also In re Dammers & Vanderheide & Scheepvaart Moats Christina B.V.*, 836 F.2d 750, 755 (2d Cir. 1988); *Universal Towing Co. v. Barrale*, 595 F.2d 414, 417 (8th Cir. 1979). After the damage claims have been filed, the district court may resolve the vessel owner's claim to limitation of liability. *See In re Dammers*, 836 F.2d at 755. If the vessel owner is found liable in the court adjudicating the liability issues, but limitation is granted, then the district court distributes the limitation fund. *See S&E Shipping Corp. v. Chesapeake & Ohio Ry. Co.*, 678 F.2d 636, 643 (6th Cir. 1982). If there is more than one damage claimant, the district court distributes the fund among the claimants via an equitable proceeding called a concursus. *Id.*

B. Denial of Summary Judgment on LOLA Action

The claimant-appellant contends that the district court erred in denying its motion for summary judgment on the entire LOLA action on the basis that there was no material fact in dispute as to the vessel owner's knowledge or privity of the alleged negligence. The

appellant contends that the district court erred in denying its summary judgment motion because, in the appellant's view, any alleged negligence would be presumed to be within the knowledge and privity of the corporation because the allegedly negligent party, Charles Muer, was the chief executive officer and principal shareholder of the closely held corporation which owned the ill-fated vessel. The appellant argues that the district court was compelled to grant its summary judgment because LOLA provides relief only to owners who are not on their vessel at the time of an accident. The appellant cites four decisions supporting this view: three district court decisions and a 1969 Fifth Circuit decision.[1] In these cases, the courts dismissed the LOLA petitions because the owner was in command of the vessel at the time of the accident. The courts reasoned that since the owners could not deny privity, they could never prevail under LOLA.

The appellee urges us to rely instead on the decisions cited by the district court in which courts

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[1] *Hecht v. Makowski*, 406 F.2d 721 (5th Cir. 1969); *In re Marine Sports, Inc.*, 840 F. Supp. 46 (D. Md. 1993); *In re Ingoglia*, 723 F. Supp. 512 (C.D. Cal. 1989). *In re Follett*, 172 F. Supp. 304 (S.D. Tex. 1958).

have held that an owner's presence on a vessel is not necessarily dispositive of a LOLA action because such treatment would circumvent the two-step inquiry required in LOLA cases and would shift the burden of proof on the negligence issue.

The question presented boils down to whether or not the district court's limitation of liability inquiry is a two-step inquiry. Where issues of fact are not in dispute, we review de novo a district court's denial of summary judgment based on the resolution of a legal issue. *Teichman v. Espy*, 122 F.3d 341, 344 (6th Cir. 1997).

Many courts, including the Sixth Circuit, have held that a limitation action requires the district court to make a two-step inquiry: (1) negligence or unseaworthiness, and (2) the owner's privity or knowledge of the negligence. The claimant-appellant argues in essence that since it is conceded that Charles Muer was on the vessel at the time of its sinking, the district court should have dismissed the LOLA action as a matter of law. We disagree. Such a dismissal would obviate the claimant's burden to demonstrate negligence or unseaworthiness.

This court, and others, have already clearly established that LOLA involves two inquiries. *See In*

re Cleveland Tankers, Inc., 67 F.3d 1200, 1203 (6th Cir. 1995), *cert. denied*, 517 U.S. 1220 (1996); *In re Consolidation Coal Co.*, 123 F.3d 126, 132 (3d Cir. 1997) (noting two-step inquiry of (1) negligence and (2) the vessel owner's privity or knowledge of the negligence), *cert. denied*, 118 S. Ct. 1380 (1998); *In re Beiswenger Enters. Corp.*, 86 F.3d 1032, 1036 (11th Cir. 1996) (noting that in a limitation proceeding under LOLA, the court engages in a two-step analysis with the first being the privity or knowledge of the vessel owner), *cert. denied*, 117 S. Ct. 2455 (1997); *In re Dammers*, 836 F.2d 750. 755 (2d Cir. 1988); *In re Hercules Carriers, Inc.*, 768 F.2d 1558, 1563-64 (11th Cir. 1985) (outlining same two-step analysis); *In re Farrell Lines, Inc.*, 530 F.2d 7, 10 (5th Cir. 1976) (laying out same two-step analysis and noting that "the initial burden of proving negligence or unseaworthiness rests with the libelants"); *Keller v Jennette*, 940 F. Supp. 35, 37 n. 6, 38, 39 (D. Mass. 1996) (outlining the same two-step inquiry and noting that *Fecht* is the only court of appeals decision dismissing a LOLA petition without insisting on a showing that the owner's negligence caused the accident); *Polly v. Estate of Carlson*, 859 F. Supp. 270, 274 (E.D. Mich. 1994) (rejecting argument that owner's presence on boat is fatal to a LOLA action and adopting the same two-step analysis to determine a LOLA petition); *In re Martell*, 742 F. Supp. 1147, 1153 (S.D. Fla. 1990) (applying

two-step inquiry and finding that because claimants unable to satisfy their initial burden of proving negligence or unseaworthiness, vessel owner was entitled to exoneration of liability under LOLA); *In re Cirigliano*, 708 F. Supp. 101, 103-104 (D.N.J. 1989) (noting that LOLA requires court to engage in two-step inquiry and applying that test). This court has already explained the operation of LOLA and the claimant's burden in relation to negligence.

> Under the Limitation Act, a ship owner is entitled to exoneration if he, his vessel, and crew are found to be completely free of fault. Even if not completely free of fault, the ship owner is entitled to limitation of liability if the ship owner had no knowledge or privity to the ship's negligence or unseaworthiness. The burden of proving negligence lies on the person claiming to be injured, but once negligence is established, the vessel's owner must prove lack of knowledge or privity to the negligence.

In re Cleveland Tankers, Inc., 67 F.3d at 1203 (internal citations omitted). Thus, the district court is charged with a two-step inquiry: (1) negligence or unseaworthiness, and (2) the owner's knowledge or privity. If neither is shown, then the vessel owner is entitled to a limitation of liability. *Id.* Thus, it is not the

case, as the claimant-appellant urges, that simply alleging facts that support a finding of knowledge or privity, the second step in the district court's inquiry, leads to a dismissal as a matter of law of a LOLA action. As stated in *In re Cleveland Tankers*, the claimant carries the burden of demonstrating negligence and thus the mere showing of privity or knowledge, the second step, does not preclude a LOLA action.

For authority, the appellant relies upon language in *Fecht v. Makowski*, 406 F.2d 721 (5th Cir. 1969), as well as the same reasoning as it appears in the three previously mentioned district court decisions.

> [W]hen an owner is in control of and operating his pleasure craft he has privity or knowledge with respect to the operation, therefore he is not entitled to limitation for accidents arising from his negligence.

Id. at 722. In rejecting the very same argument for a preclusion of the limitation of liability, the Eleventh Circuit offered apt commentary. In an opinion authored by Judge Godbold 18 years after he authored *Fecht*, the Eleventh Circuit took *Fecht* to mean what Gilmore and Black suggested in *The Law of Admiralty*, § 10-23: "Owners careless enough to operate (or to be on

board) their own boats when an accident occurs need not hope for much sympathy," *In re M/V Sunshine, II*, 808 F.2d 762, 764 (11th Cir. 1987) (quoting *The Law of Admiralty*, § 10-23 at 883). Judge Godbold characterized his own opinions as more a "precatory statement" than a legal principal, explaining that despite any privity or knowledge on the part of the owner, negligence remained a prerequisite to the preclusion of a limitation of liability. *Id.* "The owner's presence is not necessarily fatal to his right to limit if the evidence suggests that his conduct was in all respects prudent." *Id.* (quoting Gilmore and Black, *The Law of Admiralty*, § 10-23 n. 93). "In short, in most circumstances negligence in operation will be sufficiently connected to the owner on board his own small vessel and operating it that he will be found to have privity or knowledge, but this common sense recognition of how the facts will usually work out is not an ineluctable doctrine....The 'owner at the helm' doctrine is a useful tool directed toward proper decision and not a talisman." *Id.*[2]

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[2]The strength of *Fecht*'s authority is also undermined by the fact that the Fifth Circuit based its decision in *Fecht* on the fact that the limitation of the owner's liability would not have been possible under any circumstances because the vessel owner had stipulated prior to trial that the complaint, insofar as it

The district court correctly followed the framework outlined in *In re Cleveland Tankers*. Because it committed no legal error in denying the appellant summary judgment, we affirm the district court on this issue.[3]

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sought a limitation of liability, was withdrawn and that the vessel owner was seeking only exoneration. *See Fecht*, 406 F.2d at 722 n. 4. In that sense, *Fecht*'s statements that an owner at the helm cannot limit liability do not carry the authority urged by the appellant. In addition, the cited district court decisions are certainly in the minority. *Fecht* is the only court of appeals decision supporting such a notion, and the Fifth Circuit has since revised its position. *See In re Farrell Lines*, 530 F.2d at 10.

[3]The appellant also seems to make an argument that exoneration is not available to the petitioner-appellee in its LOLA action. This argument is meritless. Under Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims, a shipowner-petitioner "may demand exoneration from as well as limitation of liability" and "shipowners routinely seek exoneration and limitation of liability in the alternative." *Texaco, Inc. v. Williams*, 47 F.3d 765, 769 & n. 19 (5th Cir. 1995); *see also Odeco Oil and Gas Co., Drilling Div. v. Bonnette*, 74 F.3d 671, 675 N. 7 (5th Cir.)

C. Going Beyond the LOLA Action

The appellant argues that the district court erred in reaching matters beyond those of the LOLA action. We review for an abuse of discretion the failure of a district court adjudicating a LOLA petition to remit issues beyond the petition to the state court. *Ex parte Green*, 286 U.S. 437, 438-39 (1932); *Langnes v. Green*, 282 U.S. 531, 542 (1931); *Gorman v. Cerasia*, 2 F.3d 519, 522 (3d Cir. 1993). The backdrop of the appellant's assertion is a long-standing tension between a vessel owner's right to have the liability limitation determined in federal court, where there is no right to a jury trial, see *Waring v Clarke*, 46 U.S. 441, 459 (1847) (holding that Seventh Amendment does not provide for jury trials in admiralty cases); *Newton v. Shipman*, 718 F.2d 959, 962 (9th Cir. 1983) (explaining that there is no right to a jury trial in a limitation action), and a claimant's pursuit of remedies in state court. The appellant in this case would prefer to have the

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("Exoneration is not mentioned in the Limitation Act, but the Supplemental Rules for Certain Admiralty and Maritime Claims state that a complaint seeking limitation may also demand exoneration."), *cert. denied*, 117 S. Ct. 79 (1996); *In re Consolidation Coal Co.*, 123 F.3d at 132.

negligence question determined by a jury in the context of his general wrongful death action in state court.

Federal courts have exclusive admiralty jurisdiction to determine whether a vessel owner is entitled to limited liability. *Green*, 286 U.S. at 439-40; *Langnes*, 282 U.S. at 539-40. However, the same statute that grants the federal courts exclusive admiralty jurisdiction saves to suitors "all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333(1). The "savings to suitors" clause of § 1333 embodies a presumption in favor of jury trials and common law remedies in the forum of the plaintiff's choice. *See Odeco Oil & Gas Co. v. Bonette*, 74 F.3d 671, 674 (5th Cir. 1996); *In re Dammers*, 836 F.2d 750, 754 (2d Cir. 1988). Thus, a tension exists between the exclusive jurisdiction vested in the admiralty courts to determine a vessel owner's right to limited liability and the savings to suitors clause. *See, e.g., Jefferson Barracks Marine Serv., Inc. v. Casey*, 763 F.2d 1007, 1009 (8th Cir. 1985) ("The conflict between the Limitation of Liability Act . . . and the 'saving to suitors' clause . . . has been troublesome for the courts.") In resolving this tension, the "primary concern is to protect the shipowner's right to claim the Act's liability cap, and to reserve the adjudication of that right in the federal forum." *In re Beiswenger Enters. Corp.*, 86 F.3d at 1037 (11th Cir. 1996)

(quoting *Magnolia Marine Transport Co., Inc. v. Laplace Towing Corp.*, 964 F.2d 1571, 1575 (5th Cir. 1992)).

To accommodate the competing interests of a shipowner's right to limit liability and claimant's right to a trial by jury, the Supreme Court has established two situations in which a claimant must be allowed to pursue a claim before a jury. *See Langnes*, 282 U.S. 531; *Green*, 286 U.S. 437. The first situation is where the value of the limitation fund (value of vessel plus freight) exceeds the total value of all claims asserted against the vessel owner, see *Odeco*, 74 F.3d at 674, and the second is where only one claim is asserted against the vessel owner. *See Lake Tankers Corp. v. Henn*, 354 U.S. 147 (1957); *In re Dammers*, 836 F.2d 750, 755 (2d Cir. 1988).

In this second situation, a district court is obliged to dissolve its injunction against all other legal proceedings when only one claim is asserted against the shipowner and sufficient stipulations are filed. When a single claimant brings an action seeking damages in excess of the limitation fund, the district court must lift the stay against other proceedings if the claimant concedes the admiralty court's exclusive jurisdiction to determine all issues relating to the limitation of liability. *Green*, 286 U.S. 438-40; *Langnes*,

282 U.S. 540-44; *In re Dammers*, 836 F.2d at 755. In the situation of a single claimant, the district court must lift the stay and the state court action is permitted to continue until a judgment is rendered.[4] *See, e.g., In re Mucho K., Inc.*, 578 F.2d 1156, 1158 (5th Cir. 1978); *In re Zapata Gulf Marine Corp.*, 787 F. Supp. 612, 613 (E.D. La. 1992). While the state court action is pending adjudication, the limitation action is held in abeyance. *Langnes*, 282 U.S. at 540. If the plaintiff challenges the shipowner's right to limit liability during the state court proceedings, the federal court may reinstate its stay of the state court proceedings in order to protect the paramount federal right. *Id.* at 539-40. If no such challenge is made and the state court renders a judgment in favor of the shipowner, or in favor of the claimant in an amount less than the limitation fund, the limitation proceeding is dismissed as moot. *See, e.g., In re Cooper/T. Smith Stevedoring*

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[4]There is no contention that Karbel is not a single claimant. *See In re Two R Drilling Co., Inc.*, 943 F.2d 576 (5th Cir. 1991) (noting that single claimant exception applies even when the single claimant represents others); *In re McAllister Towing of Va., Inc.*, --F. Supp.--, 1998 WL 139397, at *4 (E.D. Va. Mar. 18, 1998); *In re Zapata Gulf Marine Corp.*, 787 F. Supp. 612, 614 (E.D. La. 1992).

Co., Inc., 735 F. Supp. 1264, 1268 (W.D. La. 1991). However, if the claimant receives a state court judgment in excess of the limitation fund, the federal action proceeds in order to determine those issues relevant to the limitation of liability. Gilmore & Black, *The Law of Admiralty* § 10-18 (2d ed. 1975). This compromise was developed to preserve both the claimant's right to a trial by jury and the shipowner's right to limit its liability. *See, e.g., Luhr Bros.*, 765 F. Supp. at 1267.

The appellee argues that principals of judicial economy supported the district court's decision to rule on issues outside of the LOLA action. In addition, the appellee cites the Supreme Court's decision in *Hartford Accident & Indemnity Co. of Hartford v. So. Pacific Co.*, 273 U.S. 207 (1927), for support of a district court's power to decide issues ancillary to a LOLA petition.

Hartford Accident was brought to the Supreme Court by the insurance company who disputed the lower court's jurisdiction to adjudicate the claimants' claims. *Hartford Accident* does contain language suggestive of a district court's wide-reaching power in a LOLA action, but for several reasons that decision does not support the district court's decision in this case to entertain questions outside of the LOLA action. First, *Hartford Accident* concerns a multi-claimant

situation where a concursus is needed, the very purpose of a LOLA action. 47 S. Ct. at 216. "One of the reasons for the result in the *Hartford* case was the inequity of sending claimants empty away, to begin new suits, after the owner had impeded them in the bringing of the suits." *The Linseed King*, 48 F.2d 311, 318 (S.D.N.Y. 1930), *rev'd on other grounds*, 285 U.S. 502 (1932). In *Hartford Accident*, the Court simply sanctioned a concursus, a process that continues to be the "heart" of a LOLA court's task when faced with multiple claimants. *Maryland Cas. Co. v. Cushing*, 347 U.S. 409, 417 (1954).

Second, as stated above, it is clearly established that where there is a single claimant, the district court must allow that claimant to use the state courts. *See, e.g., In re S&E Shipping Corp.*, 678 F.2d 636, 643 (6th Cir. 1982) ("The district court . . . must dissolve a stay of proceedings and permit claimants to litigate their claims in alternative forums . . . if only one claim is made, regardless of its size."); *Cincinnati Gas & Elect. Co. v. Abel*, 533 F.2d 1001, 1003 (6th Cir. 1976) ("[In *Langnes*,] [t]he Supreme Court directed that proceedings go forward in the state court, with the federal court retaining the petition for limitation as a matter of precaution, to be acted upon only if the claimant should bring into question the owner's right to limitation."); *In re Consolidation Coal Co.*, 123 F.3d at

132-33 ("the case law is clear that in a single claimant . . . situation . . . the claimant is entitled to proceed in state court after making the appropriate stipulations"). The Supreme Court has explained that requiring claimants to proceed in federal court where there is only one claim or the fund is adequate to cover all claims would transform LOLA from an instrument protective of a vessel owner's liability to "an offensive weapon by which the shipowner could deprive suitors of their common-law rights." *In re S&E Shipping Corp.*, 678 F.2d at 643 n. 12 (citing *Lake Tankers Corp.*, 354 U.S. at 152-53). "In view of the explicit mandate from Congress the respondent must not be thwarted in her attempt to employ her common-law remedy in the state court where she may obtain trial by jury." *Lake Tankers Corp.*, 354 U.S. at 152.

Third, the Supreme Court has explained that the federal courts do not have exclusive jurisdiction of either DOHSA or in personam maritime claims and that state courts are equally competent to adjudicate such claims. *See Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222, 232 (1986). Lastly, the savings to suitors clause already discussed allows plaintiffs their choice of forums.

The district court overstepped its bounds by reaching issues ancillary to the LOLA action when the

claimant-appellant stipulated to the district court's jurisdiction of the LOLA action.[5] By ignoring the limitations of its LOLA role, the district court abused its discretion. Accordingly, we reverse and vacate those portions of its orders pertaining to non-LOLA matters.

D.

Because the district court should not have reached any matters beyond those of the LOLA action, we need not address any of the appellant's remaining points on appeal.

CONCLUSION

Although the district court did not err in denying the appellant summary judgment on the LOLA action, the district court abused its discretion in reaching issues beyond those presented by the LOLA action. Accordingly, we AFFIRM in part and REVERSE and REMAND in part for further proceedings in accordance with this opinion.

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[5]No objections have been made to the adequacy of the stipulations.

CONCURRING IN PART, DISSENTING IN PART

CONTIE, Circuit Judge, concurring in part and dissenting in part. Though I agree with my colleagues' conclusion that the district court properly refused to dismiss the Limitation of Liability Act ("LOLA") claim on summary judgment, I do not agree with the majority's decision to reverse and remand the non-LOLA issues.

The district court initially lifted the stay in state court, thereby allowing the state court to determine the decedents' damages for pre-death pain and suffering under the Death on the High Seas Act ("DOHSA"). The district court later decided that it need not defer to the state court on the issues presented by Karbel's pre-death pain and suffering claim. The district court subsequently held, as a matter of law, that DOHSA barred Karbel's pre-death pain and suffering claim.

Though my colleagues believe that the district court erred by deciding the DOHSA claim, the district court clearly had jurisdiction to decide Karbel's general maritime and DOHSA claims. *See S & E Shipping Corp. v. Chesapeake & Ohio Railway Co.*, 678 F.2d 636, 642 (6th Cir. 1982) ("The United States district courts have exclusive original jurisdiction over '[a]ny case or admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are

otherwise entitled.' 28 U.S.C. Sec. 1333. The policies of the Limitation Act can conflict with the saving to suitors clause."). Moreover, judicial economy strongly favored a decision by the district court, because the court was familiar with the underlying issues and factual and procedural background. *See generally Pershing Auto Rentals, Inc. v. Gaffney*, 279 F.2d 546, 552 (5th Cir. 1960) (recognizing the "acknowledged power of the admiralty court to adjudicate the whole case and grant full relief").

Because the district court had the authority to determine whether damages for pre-death pain and suffering may be recovered in a DOHSA action, I respectfully dissent from the majority's decision to reverse and remand the non-LOLA matters.

APPENDIX B

UNITED STATES COURT OF APPEALS
EASTERN DISTRICT OF MICHIGAN

ORDER

Filed March 14, 1996

Pages 28a - 43a

APPENDIX B: **Opinion and order of the United States District Court, Eastern District of Michigan Filed March 14, 1996.**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN THE MATTER OF THE COMPLAINT OF ESTATE OF CHARLES A. MUER, Deceased, and C.A. MUER CORPORATION, AS OWNERS OF THE SAILING VESSEL "CHARLEY'S CRAB," FOR EXONERATION FROM OR LIMITATION OF LIABILITY	Case No. 95-71761 Honorable John Corbett O'Meara Filed: March 14, 1996

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MEMORANDUM OPINION AND ORDER GRANTING PETITIONERS' MOTION FOR PARTIAL SUMMARY JUDGMENT, DENYING CLAIMANT'S MOTION FOR SUMMARY JUDGMENT AND GRANTING CLAIMANT'S MOTION TO LIFT STAY

This matter came before the court on Petitioners' November 17, 1995 motion for partial summary judgment and Claimant's December 8, 1995 motion for

summary judgment or, in the alternative, to lift the stay of state court proceedings. Claimant responded to Petitioner's motion December 14, 1995; and Petitioners filed a reply January 4, 1996; and Claimant filed separate replies January 10, 1996. Oral argument on both motions was heard February 1, 1996.

BACKGROUND FACTS

This case involves a boating accident which occurred in the Atlantic Ocean off the coast of Florida on March 13, 1993. The vessel *Charley's Crab* was lost at sea in a storm, resulting in the deaths of Charles A. Muer, Betty Muer, George F. Drummey, and Lynne S. Drummey. On December 12, 1994, Robert A. Karbel, personal representative of the Drummeys' estates, filed a wrongful death action in the Circuit Court for the County of Wayne, Michigan.

The Estate of Charles A. Muer and the C.A. Muer Corporation, as owners of the vessel *Charley's Crab*, filed the present action for exoneration from or limitation of liability pursuant to 46 U.S.C. §§ 181 *et seq.*, on April 27, 1995. This court granted Karbel leave to intervene in the present action on behalf of the Drummeys' estates. On August 23, 1995, this court entered an order which, among other things, stayed

any future action, except discovery, in the Wayne County Circuit Court case.[1]

STANDARD OF REVIEW

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

"A fact is 'material' and precludes grant of summary judgment if proof of that fact would have [the] effect of establishing or refuting one of the essential elements of the cause of action or defense asserted by

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[1]In the state suit Karbel, as personal representative of the estates of George and Lynn Drummey, is the plaintiff; and the estate of Charles A. Muer and C.A. Muer Corporation are the named defendants. For purposes of this federal suit, the estate of Charles A. Muer and the C.A. Muer Corporation are the petitioners; and Robert A. Karbel, as personal representative of the estates of George and Lynne Drummey, is the claimant.

the parties, and would necessarily affect [the] application of appropriate principal[s] of law to the rights and obligations of the parties." *Kendall v. Hoover Co.*, 751 F.2d 171, 174 (6th Cir. 1984) (citation omitted) (quoting Black's Law Dictionary 881 (6th ed. 1979)).

The court must view the evidence in a light most favorable to the nonmovant as well as draw all reasonable inferences in the nonmovant's favor. *See United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Bender v. Southland Corp.*, 749 F.2d 1205, 1210-11 (6th Cir. 1984).

The movant bears the burden of demonstrating the absence of all genuine issues of material fact. *See Gregg v. Allen-Bradley Co.*, 801 F.2d 859, 861 (6th Cir. 1986). The initial burden on the movant is not as formidable as some decisions have indicated. The moving party need not produce evidence showing the absence of a genuine issue of material fact. Rather, "the burden on the moving party may be discharged by 'showing' -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the moving party discharges that burden, the burden shifts to the nonmoving party to set forth specific facts showing a

genuine triable issue. Fed. R. Civ. P. 56(e); *Gregg*, 801 F.2d at 861.

To create a genuine issue of material fact, however, the nonmovant must do more than present some evidence on a disputed issue. As the United States Supreme Court stated in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986),

> There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return the verdict for that party. If the [nonmovant's] evidence is merely colorable, or is not significantly probative, summary judgment may be granted.

(Citations omitted). *See Catrett*, 477 U.S. at 322-23; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). The standard for summary judgment mirrors the standard for a directed verdict under Fed. R. Civ. P. 50(a). *Anderson*, 477 U.S. at 250. Consequently, a nonmovant must do more than raise some doubt as to the existence of a fact; the nonmovant must produce evidence that would be sufficient to require submission to the jury of the dispute over the fact. *Lucas v. Leaseway Multi Transp. Serv., Inc.*, 738 F. Supp. 214, 217 (E.D. Mich. 1990),

aff'd, 929 F.2d 701 (6th Cir. 1991). The evidence itself need not be the sort admissible at trial. *Ashbrook v Block*, 917 F.2d 918, 921 (6th Cir. 1990). However, the evidence must be more than the nonmovant's own pleadings and affidavits. *Id.*

ANALYSIS

I. Petitioners' Motion for Partial Summary Judgment

Petitioners seek summary judgment on Counts I and III, which are wrongful death claims based on general maritime law. In addition, Petitioners seek summary judgment on that portion of Count II which is brought under general maritime law.

In 1970 the United States Supreme Court created a general maritime law cause of action for wrongful deaths occurring in territorial waters, that is to say, inland waters and waters within one marine league from the shore of any state. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). The Death on the High Seas Act ("DOHSA"), 46 U.S.C. § 761, provides such an action for deaths "occurring on the high seas beyond a marine league from the shore of any state . . . ." The law is well settled that where the

death occurred beyond one marine league from shore, DOHSA provides the exclusive measure of damages; and DOHSA may not be supplemented by the remedies provided under general maritime law, *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), or by state law. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986).

In the complaint, Claimant alleged that the vessel sank and the resulting loss of life occurred within one marine league from the coast of Florida. Complaint at 6 and 7. However, Petitioners contend that there is no evidence to support such a finding. In fact, in answers to interrogatories, Claimant concedes,

> We do not believe at this time that we can establish that the vessel sank within one marine league of the Florida coast. It is more likely that it was in the neighborhood of four to five marine leagues.

Petitioners' Ex. C at 8.

Furthermore, James Allen, Claimant's expert witness, testified in his deposition that the accident occurred more than one marine league from shore. Petitioners' Ex. D at 144.

In his response Claimant concedes that Petitioners have correctly stated the law as well as the answers to interrogatories and Allen's deposition testimony. However, Claimant contends that it would be improper for the court to rule on Petitioners' motion while Claimant's later-filed motion for Summary Judgment is pending. Claimant further requests that the law not be applied by this court "at this time, before it has conclusively established that the deaths occurred outside the territorial limits of Florida." Claimant's resp. at 3. Finally, Claimant states,

> In short, petitioners present a very incomplete picture given the burden upon them to show that there is no genuine issue of fact and no reasonable likelihood that further factual development could result in a material issue of fact being presented. Yet, it is precisely that level of certainty that is required before summary judgment is appropriate. *Ozark Milling [Co.] v. Allied Mills, Inc.*, 480 F.2d 1014 (8th Cir. 1973); *Carlson Cos. v. Sperry and Hutchinson [Co.]*, 374 F. Supp. 1080 (D.C. Minn. 1973).

Claimant's resp. br. at 6. Both of the cases relied upon for this standard of review are pre-*Celotex* and *Liberty Lobby, supra*, and no longer state the proper

standard to be applied by this court. Under the proper standard, Claimant has failed to produce evidence that would be sufficient to require submission to a jury. *Liberty Lobby*, 477 U.S. 249-50.

Claimant's argument that this motion should be reserved to the state court is without merit, as the case is properly before this court and the issues have been fully briefed and argued. In the interest of judicial economy, this court will rule on Petitioners' motion.

The court finds that Petitioners are entitled to summary judgment on Counts I and III and on Count II to the extent it alleges a claim for damages under general maritime law.

In the instant motion Petitioners also seek summary judgment on the issue of damages under DOHSA, which specifically limits recovery for wrongful death to "pecuniary loss." 46 U.S.C. § 762. When answering interrogatories regarding economic information, Claimant has repeatedly stated, "We do not claim economic loss." Petitioners' Ex. C and E. Thus, Petitioners are entitled to summary judgment on this issue as well. However, Petitioners have not moved for, nor has this court granted, summary judgment on survivor damages which may be

recoverable by the Drummeys' estates for damages allegedly incurred by the decedents at the time of the accident.

II. Claimant's Motion for Summary Judgment or to Lift Stay

Claimant first seeks summary judgment in its entirety of Petitioners' action, which was brought pursuant to the Limitations of Liability Act ("LOLA"), 46 U.S.C. §§ 181 *et seq*.

> The liability of the owner of any vessel . . . for any . . . loss . . . without the privity or knowledge of such owner . . . shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending. 46 U.S.C. § 183(a).

Anderson v. Whittaker Corp., 894 F.2d 804, 815 (6th Cir. 1990)

> A shipowner seeking limitation of liability bears the burden of proving that he was without knowledge of the condition or negligence responsible for the collision. *Coryell v. Phipps*, 317 U.S. 406 (1943).

Hellenic Lines, Ltd. v. Prudential Lines, Inc., 813 F.2d 634 (4th Cir. 1987).

Claimant contends that in cases such as the instant action, in which the alleged negligent party was a chief executive officer and principal shareholder of a closely held corporation, any negligence is presumed to be within the knowledge and privity of the corporation. Claimant further asserts that such facts compel this court to grant summary judgment on the instant petition because LOLA provides relief only for owners who are not on the vessel at the time of the accident.

Claimant has cited four cases which support his view: *Fecht v. Makowski*, 406 F.2d 721 (5th Cir. 1969); *Complaint of Marine Sports, Inc.*, 804 F. Supp. 46 (D.C. Md. 1993); *In re Ingoglia*, 723 F. Supp. 512 (C.D. Cal. 1989); and *In re Follet*, 172 F. Supp. 304 (D. Tex. 1958). In each of those cases, the court dismissed the petition because the owner was in command of the vessel when the accident occurred. Those courts reasoned that since the owners could not deny privity, they could never prevail under LOLA.

However, three courts have held that an owner's presence on the vessel is not dispositive: *Petition of*

M/V Sunshine, II, 808 F.2d 762 (11th Cir. 1987); *Polly v. Estate of Carlson*, 859 F. Supp. 270 (E.D. Mich. 1994); and *Complaint of Cirigliano*, 708 F. Supp. 101 (D.N.J. 1989). This court finds that these opinion are more sound.

In *Polly*, Judge Feikens addressed the same issue asserted by the instant claimant.

> Polly next argues that I should dismiss the LOLA claim because LOLA only permits boat owners to limit their liability for loss, damage, or injury if the act, damage, or injury occurred without the owner's privity or knowledge or malfeasance and/or nonfeasance. 46 U.S.C. § 183(a). She maintains that any occurrence involving a pleasure craft operated by the owner (Arne here) is, as a matter of law, within the owner's 'privity or knowledge.'

Polly, 859 F. Supp. at 273-74. After recognizing that some cases have supported Polly's position, Judge Feikens rejected the argument because it would circumvent the two-step inquiry required in LOLA cases and would turn around the burden of proof on the negligence issue. Furthermore, it would deprive innocent owners who are alleged to be actively

negligent of the right to pursue an admiralty court determination of negligence and exoneration from liability, thereby defeating the admiralty court's exclusive jurisdiction.

> Here, at this early stage in the proceedings, no one has sufficient knowledge either to determine what caused this accident or to conclude that [the owner] had privity or knowledge of the alleged acts of malfeasance contributing to the accident.

Id. at 274. This court finds Judge Feikens' opinion in *Polly*, as well as the holdings in *M/V Sunshine II* and *Cirigliano*, well-reasoned and on point. Accordingly, Claimant's motion for summary judgment will be denied.

In the alternative, Claimant has sought to lift the stay of the state court proceedings pursuant to the "saving to suitor's clause" of 28 U.S.C. § 1333.[2] The

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[2]"The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333.

Supreme Court has held that in LOLA cases in which a lone claimant brings an action seeking an amount in excess of the value of the vessel, the court must lift any stay of proceedings which it has entered, provided that the claimant concedes the jurisdiction of the admiralty court, agrees that he or she will not attempt to enforce a state court judgment except through the proceedings in federal court, and agrees that there will be no *res judicata* effect given in the federal proceedings to findings in the state court on the limitation issue. *Langes v. Green*, 282 U.S. 531 (1931).

Petitioners argue that in the instant action there are multiple claimants, the estate of George Drummey and the estate of Lynne Drummey, both of which are represented by claimant Karbel. However, even when there are multiple claims, they may be treated as a lone claim if the claimants agree to a priority scheme that will prevent the value of the fund from being exceeded. *Gorman v. Cerasia*, 2 F.3d 519 (3rd Cir. 1993).

At page 4 of his December 8, 1995 motion for summary judgment or, in the alternative, motion to lift stay of state court proceedings, Claimant offered to

stipulate as follows: 1) that the federal court retains jurisdiction over the subject matter and the parties in the limitation of liability action; 2) that any findings of fact or conclusions of law rendered in the state action shall not have *res judicata* effect on issues necessary to determination by this court of the rights of the respective parties in this proceeding; 3) that if there is limitation of liability following entry of judgment in the state proceeding in favor of both the Lynne Drummey and George Drummey estates, any distribution of the fund will be made to the estates, and in discharge of any fees and costs which may be awarded, on a *pro rata* basis not exceeding in total the value of the fund; and 4) that if plaintiff in the state court action obtains a judgment, no effort will be made to enforce that judgment until the action in this court has concluded and, then, not beyond the limitation established in any judgment or order of this court upon conclusion of these proceedings. Claimant's Ex. A. Because of the stipulations offered by Claimant, the court will lift the stay of the state court proceedings.

ORDER

It is hereby **ORDERED** that Petitioners' motion for partial summary judgment is **GRANTED**.

It is further **ORDERED** that Claimant's motion for summary judgment is **DENIED**.

It is further **ORDERED** that Claimant's motion to lift the stay of state court proceedings is **GRANTED**.

_____

John Corbett O'Meara
United States District Judge

Date: _____

APPENDIX C

UNITED STATES COURT OF APPEALS
EASTERN DISTRICT OF MICHIGAN

OPINION AND ORDER
WITH JUDGMENT

Filed July 31, 1996

APPENDIX C: Opinion and Order of the United States District Court, Eastern District of Michigan Filed July 31, 1996 and Judgment.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN THE MATTER OF THE COMPLAINT OF ESTATE OF CHARLES A. MUER, Deceased, and C.A. MUER CORPORATION, AS OWNERS OF THE SAILING VESSEL "CHARLEY'S CRAB," FOR EXONERATION FROM OR LIMITATION OF LIABILITY	Case No. 95-71761 Honorable John Corbett O'Meara Filed July 31, 1996

_____/

OPINION AND ORDER GRANTING PETITIONER CORPORATION'S MOTION TO JOIN, DENYING CLAIMANT'S MOTION TO DISMISS PETITIONER'S MOTION, DENYING CLAIMANT'S MOTION TO SET ASIDE MARCH 14, 1995 ORDER, AND GRANTING PETITIONER'S MOTION FOR SUMMARY JUDGMENT

The court heard oral argument and ruled on a number of motions on June 26, 1996. For the reasons set forth on the record and those that follow, the court will grant petitioner Muer Corporation's unopposed May 7, 1996 motion to join; deny claimant Karbel's May 2, 1996 motion to dismiss petitioner Estate's motion for summary judgment; deny claimant Karbel's June 10, 1996 motion to set aside the court's March 14, 1996 order granting partial summary judgment; and grant petitioners' April 26, 1996 motion for summary judgment on claims for damages for decedents' pre-death pain and suffering and mental anguish.

The first motion, petitioner Muer Corporation's motion to join in petitioner Muer Estate's motion for summary judgment, was unopposed; therefore, the court will grant the motion.

The second motion was Claimant's motion to dismiss the Estate's motion for summary judgment. Claimant argued that since the court had remanded most of the case to state court,[1] the issue raised in the Estate's motion should be heard and decided by the state court. The Estate asserted, however, that there

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[1]This court retained the issues regarding the Limitation of Liability Act.

had been only one scheduling conference in state court and that the state court was less prepared to rule on the motion than was this court, which had already disposed of some of the claims.

Claimant's argument that the state court is a better forum in which to decide the instant issues was unpersuasive for the same reason it was unpersuasive when Claimant had previously wanted the state, rather than the federal, court to rule: this court has retained jurisdiction over the case throughout, has been fully apprised of the issues, and has the power to rule on these issues. In addition, as of April 29, 1996, there is clear and unequivocal Sixth Circuit precedent in the case *Bickel v. Korean Air Lines Co., Ltd.*, 83 F.3d 127 (6th Cir. 1996), which is directly on point to the issue raised in the Estate's motion for summary judgment. Therefore, for reasons of judicial economy, the court will deny Claimant's motion to dismiss the Estate's motion for summary judgment.

The third motion was Claimant's motion to set aside this court's March 14, 1996 order granting Petitioner's motion for partial summary judgment. After the court's March 14 order, Claimant deposed Daniel Mercier, who was the last person, other than the decedents, to travel on the vessel. Mr. Mercier testified that "based upon his direct observation of the

speed indicator on the vessel, the boat on occasion reached speeds in excess of eleven knots and for an extended period of time, with favorable winds, was averaging close to ten knots." Claimant's mot. at 2.

Claimant's expert witness James Allen had previously testified that he believed the vessel was probably making six to seven knots average speed; and based on those calculations, Allen speculated that the accident would have occurred in an area farther than one marine league from the shore of Florida. Based in part on Allen's first deposition, this court granted partial summary judgment to Petitioners on March 14, as there existed no evidence that showed that the accident happened within one marine league from shore. As a result of that lack of evidence, this court found that the Death On the High Seas Act ("DOHSA"), applied, providing the exclusive measure of damages.

In the instant motion Claimant argued that Mr. Mercier's eye witness account of how fast the vessel was able to travel under perfect conditions is newly discovered evidence and that such evidence would significantly change Allen's previous opinion of where the accident occurred. Attached to the motion was Allen's second affidavit, which stated that by raising the average speed of the vessel, new calculations would

indicate that the accident *could have* occurred within one marine league from shore. Thus, Claimant argued, Allen's modified opinion raised a genuine issue of material fact regarding where the accident occurred, which, of course, is determinative of whether DOHSA applies. The Estate argued that the evidence is not new, that in fact Allen knew the vessel could travel up to ten knots and had included that information in his previous calculations.

Regardless of whether Allen's second affidavit constitutes new evidence, the court found that Claimant still failed to present any evidence that the accident happened within one marine league from Florida's coast. Even if Allen's dispositive testimony were admissible, his testimony is merely speculative. Allen has calculated that it was physically *possible* for the vessel to have been within one marine league of the coast; however, there remains no evidence, no facts, to support a showing that the accident did occur within one marine league from the coast.

Claimant's circumstantial evidence is mere speculation ungrounded in fact, and Petitioners have demonstrated "an absence of evidence to support the non-moving party's case," as required by *Celotex Corp v. Catrett*, 477 U.S. 317, 325 (1986). "The 'mere possibility' of a factual dispute is not enough." *Mitchell*

v. Toledo Hosp., 964 F.2d 577, 582 (6th Cir. 1992) (quoting *Gregg v. Allen-Bradley Co.*, 801 F.2d 859, 863 (6th Cir. 1986)). "Speculation cannot supply the place of proof." *Moore v. Chesapeake & O. Ry. Co.*, 340 U.S. 573, 578 (1951). Accordingly, there are no genuine issues of material fact; and the court will not set aside its previous order granting partial summary judgment to Petitioners.

Finally, the Estate's April 26, 1996 motion for summary judgment was supplemented by a copy of the Sixth Circuit's recent opinion in *Bickel v. Korean Air Lines Co., Ltd.*, 83 F.3d 127 (6th Cir. 1996), which holds that pre-death pain and suffering damages are not recoverable under DOHSA. At oral argument Claimant conceded that *Bickel* is dispositive of the issues presented here. Thus, Petitioners are entitled to summary judgment on the remaining claims.

ORDER

It is hereby **ORDERED** that petitioner Corporation's May 7, 1996 motion to join is **GRANTED**.

It is further **ORDERED** that Claimant's May 2, 1996 motion to dismiss Petitioners' motion for summary judgment is **DENIED**.

It is further **ORDERED** that Claimant's June 10, 1996 motion to set aside the court's March 14, 1996 order granting partial summary judgment is **DENIED**.

It is further **ORDERED** that Petitioner's April 26, 1996 motion for summary judgment is **GRANTED**.

_____

John Corbett O'Meara
United States District Judge

Date: _____

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN THE MATTER OF THE COMPLAINT OF ESTATE OF CHARLES A. MUER, Deceased, and C.A. MUER CORPORATION, AS OWNERS OF THE SAILING VESSEL "CHARLEY'S CRAB," FOR EXONERATION FROM OR LIMITATION OF LIABILITY	Civil Case No. 95-71761DT Honorable John Corbett O'Meara

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JUDGMENT

This action came before the Court, Honorable John Corbett O'Meara, District Judge, presiding, and the issues having been considered and a decision having been duly rendered,

It is **ORDERED** and **ADJUDGED** that the claimant, Karbel, take nothing, that the action be dismissed on the merits, and that the petitioners recover of the claimant its costs of action.

JOHN P. MAYER, CLERK

BY: _____
DENISE M. GOODLINE
DEPUTY CLERK

DATED: 7/31/96

APPROVED:

_____
JOHN CORBETT O'MEARA
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

Sixth Circuit Case Nº. 96-2111
Filed July 16, 1998

APPENDIX D: Order of the United State Court of Appeals for the Sixth Circuit Filed July 16, 1998

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ESTATE OF
CHARLES A. MUER,
Deceased,
Plaintiff-Appellee

C.A. MUER CORP.,
Plaintiff

Filed
July 16, 1998

v.

ROBERT A. KARBEL,
Personal Representative
of the Estate of George
F. Drummey and Lynne
Drummey,
Intervenor-Appellant

---/

Before: CONTIE, DAUGHTREY, and COLE,
Circuit Judges

ORDER

Upon consideration of the petition for rehearsing filed by the appellee,

It is **ORDERED** that the petition for rehearsing be, and it hereby is **DENIED**.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
EASTERN DISTRICT OF MICHIGAN

CLAIMANT'S MOTION FOR
SUMMARY JUDGMENT

Filed December 8, 1995

APPENDIX E: **Claimants motion for summary judgment pursuant to Rule 56 or, in the alternative, motion to lift stay of State court proceedings Filed in the U.S. District Court, Eastern Division of Michigan on December 8, 1995.**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN THE MATTER OF THE COMPLAINT OF ESTATE OF CHARLES A. MUER, Deceased, and C.A. MUER CORPORATION, AS OWNERS OF THE SAILING VESSEL "CHARLEY'S CRAB," FOR EXONERATION FROM OR LIMITATION OF LIABILITY

Case No. 95-CV-71761

Honorable John Corbett O'Meara

_____/

MOTION FOR SUMMARY JUDGMENT PURSUANT TO RULE 56 OR, IN THE ALTERNATIVE, MOTION TO LIFT STAY OF STATE COURT PROCEEDINGS

NOW COMES the Claimant, Robert A. Karbel, Personal Representative of the Estates of George Drummey and Lynne Drummey, Deceased, and moves for:

1) ~~sum~~mmary judgment under FRCP 56 dismissing the Complaint filed pursuant to 46 U.S.C. § 183 and 185 or, in the alternative,

2) an order lifting the stay of proceedings entered herein so that the action may continue in state court.

In support of these requests, claimant states as follows:

1. An action was filed in the Wayne County Circuit Court for the State of Michigan on December 12, 1994, captioned Robert A. Karbel, Personal Representative of the Estates of George F. Drummey and Lynne S. Drummey vs. Charles A. Muer and C.A. Muer Corporation, Jointly and Severally, case number: 94-435802 NI. The action sought damages against the Estate of Charles A. Muer and the C.A. Muer Corporation due to the wrongful death of George Drummey and Lynne Drummey on or about March 13, 1993.

2. The cause of action arose out of the disappearance and presumed death of George Drummey and Lynne Drummey when the vessel owned by the Limited Liability Act (LOLA) petitioner[1], C.A. Muer Corporation and piloted by Mr. Charles Muer, was lost at sea during a major storm off the coast of Florida.

3. The allegation of the Complaint sound entirely in negligence and all acts of negligence are attributable to Charles A. Muer. The negligence alleged in the Complaint includes without limitation:

> a. Failure to appreciate limitations on the seaworthiness of the vessel when making the decision to sail into bad weather. (PP 24, 25)

---

[1]To avoid confusion arising from the fact that the defendants in the state action have become plaintiffs in the Federal action, we will always refer to Karbel by name or as "claimant" and will always refer to the Estate of Charles A. Muer and C.A. Muer Corporation by name or as LOLA petitioners.

b. Failure to obtain weather information or to heed same prior to sailing. (PP 27)

c. Failure to seek safe harbor when information regarding the storm became readily available mid-voyage. (PP 27)

4. At the time of the loss of the vessel, Charles A. Muer was the Chief Executive Officer and was, according to the complaint in this limitation action, the sole shareholder[2] of the C.A. Muer Corporation which is a closely held corporation and which had just acquired ownership of the vessel from Mr. Muer, individually, a few days prior to the accident.

5. On or about April 27, 1995, the Estate of Charles A. Muer and C.A. Muer Corporation filed in this court an action pursuant to 46 U.S.C. § 183 and 185 in order to obtain exoneration or limitation of liability pursuant to said statutes.

---

[2]Plaintiffs now say that Mr. Muer was only the majority shareholder, not the sole shareholder. For all purposes relevant to this case, the distinction is immaterial.

6. The Complaint for limitation of liability is fatally defective in that it fails to set forth that the negligence of Charles A. Muer, if any, was not within the knowledge or privity of the owner of the vessel, the C.A. Muer Corporation.

7. Amendment of the pleadings to set forth lack of knowledge or privity would be futile because:

a. Negligence by a key manager of a corporate owner is imputed to the owner.

b. It is undisputed that Charles A. Muer was a key manager of the C.A. Muer Corporation by virtue of being the CEO and principal shareholder of the closely held corporation.

c. While the claimant has the burden of proof of establishing negligence in the first instance, the burden then shifts to the LOLA Petitioner to establish that it is without knowledge or privity concerning the negligent acts committed. Since there is no conceivable set of proofs concerning the negligence of Charles A. Muer which would place said negligence beyond his own knowledge or privity and

since his knowledge or privity would be imputed to the corporation, it is not necessary to await further factual development of the negligence claim in order to determine that the claimant is entitled to judgment as a matter of law dismissing the limitation of liability action.

8. In the event that the court determines that summary judgment is not appropriate, the claimant requests, in the alternative, that the court stay the proceedings for the following reasons:

a. The claim filed by the claimant herein is the only known claim against these petitioners which has been filed or, upon information and belief, could be filed with regard to the underlying incident;

b. In such circumstances, the current case law, discussed in the accompanying brief, provides that the stay of the state action should be lifted, provided that the claimant will make the following stipulations:

(1) That the Federal Court has jurisdiction over the subject matter and the parties in the limitation of liability action;

(2) That in the event that the court does find that the conditions antecedent to limitation of liability exist, the claimant's collectible damages against the petitioners will be limited to the value of the vessel and its cargo as determined by the court;

(3) That there will be no res judicata effect to findings in the state proceeding on the issues that are pivotal to the limitation of liability action;

(4) That where there could be multiple claims from a single accident due to such issues as consortium claims, indemnity claims, claims for attorney fees and costs or claims filed by a single personal representative for more than one decedent, then, in

the event there is limitation of liability following entry of judgment in the state proceeding in favor of competing claimants, any distribution of the fund will be made to the claimants and in discharge of any fees and costs which may be awarded, on a pro rata basis not exceeding the total value of the fund;

c. The claimant does in fact offer to make such stipulations if the court should deny the motion for summary judgment and would agree that any order staying the proceedings in this court would be effective only upon the filing of a signed stipulation by the claimant in accordance with the form attached hereto as Exhibit A.

WHEREFORE, claimant prays for the following relief:

a. Summary judgment in favor of the claimant dismissing limitation of liability action;

b. In the alternative, an order lifting the stay of the state court action and holding this case in abeyance pending completion of proceedings in the Wayne County Circuit Court.

SEIKALY & STEWART
Attorney for Claimant

By:_____
JEFFREY T. STEWART (P24138)
310 Franklin Center
29100 Northwestern Highway
Southfield, MI 48034
(810) 354-0200

Dated: December 7, 1995

APPENDIX F

UNITED STATES COURT OF APPEALS
EASTERN DISTRICT OF MICHIGAN

EXCERPT FROM TRANSCRIPT
OF HEARING HELD IN
U.S. DISTRICT COURT

Filed February 1, 1996

Pages 64a - 64a

APPENDIX F: Excerpt from transcript of hearing held in U.S. District Court, Eastern District of Michigan on February 1, 1996, page 9.

MR. STEWART: Yes, Your Honor. The Court has already observed at the outset that there was some question as to which motion should go first. The reason that we felt that was important is because if the Court sees fit to dismiss the LOLA action altogether, we still maintain very strongly it would be inappropriate for the Court to say on the one hand I really don't have jurisdiction to decide this LOLA case, but before I say that I'm going to dismiss some claims with prejudice on the merits.

So I will reserve and do reserve the argument that whatever the Court would do with this motion for summary judgment, if it were undisputedly before this Court and the case would stay in this Court, I will be asking the Court to not rule unless it's prepared to also rule that our motion to dismiss the LOLA action is outright denied and the case is not going back to state court.

(2)

98-614

No. _____

FILED
NOV 12 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1998

IN RE: CHARLES A. MUER
ESTATE OF CHARLES A. MUER, DECEASED,
Petitioner,

C.A. MUER CORP.,
Plaintiff,

v.

ROBERT A. KARBEL,
PERSONAL REPRESENTATIVE OF THE ESTATE OF
GEORGE F. DRUMMEY AND LYNNE DRUMMEY,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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November 12, 1998

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(800) 581-2252

COUNTER-STATEMENT OF QUESTION PRESENTED

Once a district court has properly ruled that a claimant under the Limitation of Liability Act (LOLA), 46 U.S.C. §183 is entitled to proceed with his claim in state court under the saving to suitors clause; may the district court nonetheless continue to accept and decide motions on LOLA issues?

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I. THE PETITION SHOULD BE DENIED BECAUSE THE DECISION OF THE SIXTH CIRCUIT VACATING THE LEGAL AND FACTUAL DETERMINATIONS OF THE DISTRICT COURT ON NON-LOLA ISSUES WAS TOTALLY CONSISTENT WITH

EXISTING PRECEDENT AND RAISES NO NOVEL OR IMPORTANT QUESTIONS WORTHY OF DETERMINATION BY THIS COURT. FURTHERMORE, THE ISSUE UPON WHICH PETITIONER NOW RELIES WAS NEVER RAISED BELOW. 9

A. There is no legal basis for the argument that a district court, recognizing its obligation to return a case to state court under the savings to suitor's clause, should or even may make any determination outside the scope of LOLA itself. 9

B. The stipulations made by the Claimant in this case were exactly what the law requires of a Claimant wishing to lift a stay of state court proceedings and did not enlarge power of the district court to make rulings on non-LOLA issues over Claimant's timely objection. 14

C. Petitioner is attempting to raise an entirely new argument in this court. 16

D. Even if *Black Diamond* is considered, it does not change the outcome. 17

CONCLUSION 21

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OPINIONS BELOW

Claimant[1] agrees with the petitioner's statement concerning Opinions Below.

STATEMENT OF JURISDICTION

Claimant concedes that the Petition for Writ of Certiorari has been timely filed in this matter and that jurisdiction is proper under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Claimant agrees that the Petitioner has properly set forth the relevant statutes.

---

[1] Because of the overlapping terminology between the LOLA proceedings, this petition and Karbel's cross-petition, we refer to Karbel as "claimant" throughout.

COUNTER-STATEMENT OF THE CASE

A. Introduction

Contrary to petitioner's introduction and its question presented, the real issue in this case centers on the oft-noted tension between the right of a LOLA petitioner to obtain limitation in federal court and the right of a claimant to proceed in state court under the saving to suitors clause.

In *Langnes* v. *Green*, 282 U.S. 531, 51 S. Ct. 243, 75 L.Ed. 520 (1931) the Court recognized that, in single-claim cases not raising a need for concursus, a claimant's right to proceed in state court under the saving to suitor's clause requires that the District Court exercise discretion in favor of allowing the state action to proceed. The balance is logical and straightforward: the federal court has exclusive jurisdiction over all LOLA questions and the state court exercises jurisdiction, without interference from the federal court, over all non-LOLA questions. In this case, however, the district court profoundly upset that balance by refusing to rule on claimant's request to return the case to state court until *after* it had ruled on motions concerning where the boat sank and whether Death on the High Seas Act (DOHSA) 46 U.S.C. § 761 would apply. Worse, it allowed petitioner to file new motions on DOHSA issues *after* the file had been re-opened in state court. The Sixth Circuit ruled, as it was compelled to under *Langnes* and every other authority, that once the right

to return to state court is established, the court may not consider non-LOLA questions.

Nonetheless, petitioner claims - for the first time in this Court - that the district court was compelled under *Black Diamond Steamship Corp.* v. *Robert Stewart and Sons, Ltd.*, 336 U.S. 386; 69 S. Ct. 622, 93 L.Ed. 754 (1949) to decide whether DOHSA or the general maritime law would apply to this case. In petitioner's view, if application of (DOHSA) would result in the value of the claim being at or less than the value of the vessel and its pending freight, then the proceeding would have to be dismissed. Thus, the court would have no choice but to determine the applicable law as a threshold jurisdictional matter. Not only is this an overstatement of *Black Diamond* (which involved no saving to suitors issue) but the court in our case was making rulings in violation of *Langnes* long before it, or even the petitioner, believed that choosing and applying DOHSA would bring the claims to an amount within the value of the vessel and eliminate the district court's need to continue the LOLA action. Further, there is no contention that the court needed to consider factual or legal issues arising under DOSHA in order to determine the other motions properly before it:

(1) Claimant's motion to dismiss the LOLA action for inability of the petitioner to state a claim under LOLA, or;

(2) Whether Claimant presented a case appropriate under

Langnes for return to state court under the saving to suitor's clause.

Nothing in this petition merits review by this Court. There is no split among the circuits on the questions raised below and nothing approaching clear error by the Sixth Circuit. If there is novelty in this case, it is in the extent to which the district court deviated from both the logic and letter of all existing precedent. Thus, there is little reason to believe that a question of this nature would likely recur.

B. Factual Background

Claimant accepts the factual background provided by the petitioner, with the following additions. (The facts set out here are only those pertinent to the issues raised in the petition to which this brief responds. Additional facts relevant to the Claimant's cross petition are provided therein.)

The final voyage of the Muer vessel (named "Charley's Crab") began on the morning of March 12, 1993. The vessel was captained by Mr. Charles A. Muer. On board also were his wife, Betty, and appellant's decedents, George and Lynne Drummey.

Although all had sailed together in the past, Mr. Muer was by far the more experienced sailor and clearly captain of the vessel. Weather reports indicated that the vessel would encounter high seas and storms coming into Florida. Nonetheless, the vessel proceeded toward the Florida Coast.

It was sighted and photographed at approximately 2:45 p.m. on March 12th by a government surveillance plane but was never seen again. At 4:30 a.m. on March 13th, a 911 telephone call was made from a cellular phone on Charley's Crab and received at a cellular tower in Lantana, Florida just a few miles south of the vessel's intended destination at the Lake Worth Inlet on the Coast of Florida. The call lasted only a few seconds and a voice connection was never made before the call terminated. Because no one on shore had been informed of the intended time of arrival, it was not appreciated for two more days that the vessel was overdue. Consequently, a coordinated search was not initiated until Monday, March 16th. This may explain why neither the vessel, its passengers nor wreckage was ever found.

C. Procedural Background

Claimant accepts petitioner's statement of the procedural background of this case with the following exceptions and additions:

- Claimant does not agree that the general maritime law action is applicable only if the deaths occurred within the territorial waters of any state. Although the Sixth Circuit did not reach this issue, Claimant has consistently argued that in circumstances like this one, in which it is known that the vessel sank close to the three mile limit but cannot be conclusively placed on either side of it, the general maritime

cause of action provided for in *Moragne v. State Marine Lines, Inc.*, 398 U.S. 375, 90 S. Ct. 1772, 26 L.Ed. 2d 339 (1970) would apply *unless* a party asserting DOHSA (in this case the petitioner) carries the burden of proof of establishing that the occurrence was more than a marine league from shore.[2]

- The concession attributed to Claimant on page 9 of the petition that Claimant did not believe *at that time* that it could establish that the sinking was less than four to five marine leagues from shore, came early in discovery. Later evidence, made available before the District Court dismissed the case, suggested that the vessel might well have made it to within three miles of shore. Petitioner had conceded all along that the vessel might have made it within five miles of shore: just two miles from the all-important three-mile limit.

- The petition suggests at page 11 that claimant waited until the hearing on February 1, 1996, to argue that the District Court should in no event decide petitioner's motion for summary judgment: it should either dismiss the LOLA action altogether or return the matter to state court for decisions on the merits. This argument was in fact set forth

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[2] This issue is not pertinent to this petition but it is crucial in the state proceedings which have continued since the Sixth Circuit's decision. Claimant raises it here strictly to avoid any later suggestion that the petitioner's contentions about *Moragne* have been conceded by Claimant.

clearly in claimant's motions and briefs as well.

- Although claimant had conceded that the case was, as a practical matter, over if the court refused to allow non-pecuniary losses to be recovered, there were claims still pending for memorial service expenses. These claims, though small, would still have been in excess of the $500 stipulated value of the vessel. This fact becomes important when the *Black Diamond* case is considered, because even these amounts would have precluded the argument that the limitation found exceeded the pending claims, warranting dismissal.

- It is incorrect that claimant never argued in the Sixth Circuit that the District Court should not have decided petitioner's first motion: claimant was steadfast in its opposition to any and all decisions by the District Court on the merits of the case.

D. The District Court's March 14, 1996 Opinion and Order

Claimant accepts petitioner's description of the court's March 14, 1996 opinion and order and events surrounding it, except that claimant did not admit in interrogatory answers that there was no pecuniary loss: only that the persons claiming non-pecuniary losses were without pecuniary damages and were not claiming economic loss based on any loss of support from the decedents. Memorial service

expense claims had been alleged in the complaint and preserved in the same interrogatory answers that conceded lack of direct pecuniary losses for the individuals.

E. Remaining Issues in the District Court

Claimant accepts petitioner's summary of the issues remaining in the district court after the March 14, 1996 Opinion and Order and the manner of their disposition. However, it should be noted that claimant has never conceded that the court was correct to place upon the Claimant the burden to establish that the sinking occurred less than three miles from shore. DOHSA, 46 U.S.C. §761 *et seq.* by its terms, establishes that he who would invoke it must show that the occurrence was more than three miles from shore. Nonetheless, the important thing for purposes of this petition is that the district court continued to rely upon judicial economy as justification for it's exercise of jurisdiction in derogation of state court jurisdiction under the saving to suitors clause.

More important, even assuming that the district court in its final round of summary judgment motions could have preceded its action by reasserting a stay of the state court proceedings, it failed to do so, finding that "judicial economy" was alone sufficient to allow it to make rulings in the case on issues that were properly within the jurisdiction of the state court simultaneously. There is no legal reason why

claimant could not have attempted to file his own motion on the same issues in the state court thereby igniting a race to judgment with inevitable issues of *res judicata* and preemption.

F. The Sixth Circuit's Decision

Claimant accepts petitioner's description of the rulings made by the Sixth Circuit.

REASONS FOR DENYING THE WRIT

The petition should be denied because the decision of the Sixth Circuit vacating the legal and factual determinations of the district court on non-LOLA issues was totally consistent with existing precedent and raises no novel or important questions worthy of determination by this court. Furthermore, the argument upon which petitioner now relies was never raised below.

A. THERE IS NO LEGAL BASIS FOR THE ARGUMENT THAT A DISTRICT COURT, RECOGNIZING ITS OBLIGATION TO RETURN A CASE TO STATE COURT UNDER THE SAVINGS TO SUITOR'S CLAUSE, SHOULD -- OR EVEN MAY -- MAKE ANY DETERMINATIONS OUTSIDE THE SCOPE OF LOLA ITSELF.

On March 14, 1996, the district court specifically granted claimant's motion to lift the stay of state court proceedings, at page 11 of its Memorandum Opinion and Order. The court's order did not indicate in any way that it intended to "ride shotgun" with the state court judge by allowing the parties to litigate in two courts at once. While claimant has been able to find no case in which a LOLA petitioner has attempted to keep litigating in the federal court after a stay of state court proceedings had been lifted, the very absence of such cases suggests that the procedure is inappropriate. It is difficult to imagine how such a process could be countenanced, whether the matter is analyzed in terms of judicial economy, comity or the saving to suitors clause itself.

In *Gorman v. Cerasia,* 2 F.3d 519 (3rd Cir. 1993), the case relied upon by the district court in lifting the stay, the Third Circuit held:

> . . . we now decide, in agreement with the Second Circuit in *Dammers [Complaint of Dammers v. Vanderheid*, 836 F2d 750 (2nd Cir. 1988)], that as long as the priority stipulations filed in the district court ensure that the shipowner will not be exposed to competing claims to the limited fund representing the value of his or her vessel, the district court may authorize the parties to

proceed with the state court action. *We believe that this is a reasonable method of reconciling the two applicable federal statutes, one "saving to suitors" their common law remedies, including the right to a jury trial, and the other protecting an innocent shipowner from claims above the value of the ship and its cargo.* 2 F3d 519, 526. (emphasis added).

The emphasized language in the quotation underscores the fact that the saving to suitors clause carries with it a federal policy which compels lifting of the stay in appropriate proceedings.

The Supreme Court has recognized not only the competence of state courts to administer maritime rights and remedies, but also the state courts' specially defined role in DOHSA cases. In *Offshore Logistics v. Tallentire*, 477 U.S. 207, 106 S. Ct. 2485, 91 L.Ed. 2d 174 (1986), Justice O'Connor interpreted § 7 of DOHSA, 46 U.S.C. § 767, which reads in part:

> The provisions of any state statute giving or regulating rights of action or remedies for death shall not be affected by this chapter . . .

The plaintiffs in that case, seeking to apply state remedies to a death occurring outside territorial waters, argued that § 7

clearly expressed a congressional intent to allow state courts not only to *hear* maritime claims but to determine them according to their own laws. However, while rejecting the power of a state court to apply its own substantive law in place of DOHSA, Justice O'Connor for the majority said:

> The "saving to suitors" clause leaves state courts competent to adjudicate maritime causes of action in proceedings in personam and means that "a state 'having concurrent jurisdiction, is free to adopt such remedies, and to attach to them such incidents, as it sees fit' so long as it does not attempt to [give in rem remedies or] make changes in the 'substantive maritime law.' [Madruga v. Superior Court, 346 U.S. 556, 560, 74 S. Ct. 298, 98 L.Ed. 290 (1954)]
>
> . . .
>
> Because the resolution of DOHSA claims does not normally require the expertise that admiralty courts bring to bear, DOHSA actions are clearly within the competence of state courts to adjudicate. *Offshore Logistics v. Tallentire*, 477 U.S. 207, 232; 106 S. Ct. 2485, 91 L.Ed. 2d 174 (1986), 222-232.

This analysis disposes of the argument that the federal

court is a preferable forum for the adjudication of DOHSA claims that have been filed in state court to begin with.

If *Langnes* means anything, it means that a plaintiff has the right to have so much of his lawsuit tried in state court as does not invade the exclusive province of the district court under LOLA. Every case which has allowed a claimant to return to state court has done so only upon the claimant stipulating to the right of the LOLA court to ultimately determine all issues peculiar to LOLA, even to the point that the judgment in state court may not be deemed *res judicata* as to questions of the owner's knowledge or privity of the negligence. However, the language used to describe the extent of the res judicata waiver supports the notion that the LOLA court does not have plenary power over all factual or legal determinations. See e.g. *Gorman v. Cerasia*, 2 F3d 519, 528 (3rd Cir. 1993):

> We agree ... that the potential overlap between the factual questions raised in the limitation proceeding (whether the maritime mishap occurred "without the privity or knowledge" of the shipowner), and those to be litigated in the state tort action (whether the shipowner acted unreasonably) requires that a claimant seeking to vacate the stay concede both the district court's exclusive jurisdiction to decide all limitation issues and expressly agree to

waive any "claim of res judicata relevant to the issue of limited liability based on any judgment obtained in the state court."

If the district court, in the final analysis, had the right to determine *all* issues relevant to the existence or extent of the owner's potential liability, rather than the issues peculiar to the statute (the limitation fund and the owner's knowledge or privity) then logic would require that a claimant wishing to return to state court waive *res judicata* effects relative to every material issue in the case. What then would be the purpose of the state proceeding? We respectfully submit that if the right of a claimant to proceed in state court is not to be rendered a mere rehearsal, there must be a clear demarcation between the territory reserved to state court and that over which the admiralty court has exclusive control. LOLA itself suggests the boundary by speaking to only two questions: administration of the limitation fund and the knowledge or privity of the owner.

B. THE STIPULATIONS MADE BY THE CLAIMANT WERE EXACTLY WHAT THE LAW REQUIRES OF A CLAIMANT WISHING TO LIFT A STAY OF STATE COURT PROCEEDINGS AND DID NOT ENLARGE THE POWER OF THE DISTRICT COURT TO MAKE RULINGS ON NON-LOLA ISSUES OVER

CLAIMANT'S TIMELY OBJECTION.

Petitioner next contends that the stipulations which the claimant offered to the district court in order to perfect his right to return to state court under *Langnes* were insufficient because they were conditional. The stipulations themselves were not conditional at all: they conformed to like stipulations filed in every case of this nature. The claimant merely asked that, prior to accepting them and returning the case to state court, the district court consider an anterior question: was the LOLA action proper in the first place. Petitioner cites no case and offers no logic for the proposition that a claimant must make an irrevocable election to either forfeit an attack upon the merits of LOLA proceeding or his right under the saving to suitors clause and *Langnes* to return to state court.

The purpose of the stipulations is to ensure that before returning to state court the claimant is committed to honoring the LOLA court's right to conclude limitation proceedings before a state court judgment is enforced. *Petition of Red Star Barge Line, Inc.*, 160 F2d 436 (2nd Cir.), cert. denied, 331 U.S. 850, 91 L.Ed. 1859, 67 S. Ct. 1741 (1947); *Complaint of Dammers v. Vanderheid*, 836 F.2d 750 (2nd Cir. 1988). Thus, there is no threat to the district court's control of the case or petitioner's right to be free of judgments in excess of the value of the vessel and its freight in allowing a claimant to mount a Rule 56 attack on the LOLA proceeding while still

in federal court and before filing irrevocably his stipulations.

C. PETITIONER IS ATTEMPTING TO RAISE AN ENTIRELY NEW ARGUMENT IN THIS COURT

The petitioner and the district court justified disposition of DOHSA questions on the basis of judicial economy and the assumption that the admiralty court was better able to consider the issues at hand than its state court counterpart. Petitioner now says that the court needed to decide whether DOHSA would apply, under compulsion from *Black Diamond Steamship Corp.* v. *Robert Stewart and Sons, Ltd.*, 336 U.S. 386, 69 S. Ct. 622, 93 L.Ed. 754 (1949.) This argument is making its debut in this Court. An examination of the Sixth Circuit's decision and petitioner's briefs below will show that this argument has never been previously asserted, nor did petitioner or the district court believe at the time the district court was acting that it was necessary to consider DOHSA questions for jurisdictional reasons.

It is fundamental that this court will generally not consider issues not presented to the courts below, absent extraordinary circumstances. Subject matter jurisdiction can certainly be an exception: however any suggestion that the court needed to consider DOHSA issues in order to establish or maintain its subject matter jurisdiction is unfounded. To

begin with, LOLA has never been determined a jurisdictional statute[3]: LOLA petitioners must establish jurisdiction under 28 U.S.C. §1333 or face dismissal. *Lewis Charters, Inc. v. Huckins Yacht Corp.*, 871 F.2d 1046 (11th Cir. 1989) (limitation action which based on occurrence in non-navigable waters, dismissed for want of §1333 jurisdiction.); *In re Three Buoys Houseboat Vacations*, 878 F2d 1096, 1100 (8th Cir. 1989) (a cause of action does not arise under the Limitation of Liability Act. Instead, the act is "more akin to a defense").

D. EVEN IF *BLACK DIAMOND* IS CONSIDERED, IT DOES NOT CHANGE THE OUTCOME.

Should the Court be willing to consider the *Black Diamond* argument at this stage of the proceedings, it would not change the outcome.

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[3] In *Sisson v. Ruby*, 497 US 358, 111 L.Ed. 2d 292, 110 S. Ct. 2892 (1990), n.1, the Court expressly declined to pass on this issue, finding that jurisdiction was sustainable under 46 U.S.C. §1333(1). In *Jerome Grubart, Inc. v. Great Lakes Dredge and Dock*, 513 U.S. 527, 115 S. Ct. 1043, 130 L.Ed. 1024 (1995), the Court was presented with the question but, again, decided the issue on the basis of §1333(1).

In *Black Diamond*, a collision involving a U.S. vessel had occurred in Belgian waters, raising the strong possibility that Belgian limitation laws would apply. If they did, the liability would be capped at a figure less than the stipulated value of the vessel. The lower courts had ruled that this, in turn, would render the LOLA proceeding unnecessary. On the other hand, since the petitioner had posted a bond based on the Belgian limitation, the amount would be insufficient if the lower limitation were not applied: once again, leading to dismissal for failure to post adequate security. The Court disposed of the issue by holding that, even if the value of ship were greater than the cap on liability, it was still not greater than the aggregate claims; therefore concursus was still necessary and dismissal of the petition would not occur. The Court declined to decide which law would apply on the record before it and remanded, with the following added remarks.

> It is important to add, moreover, that the question of what law governs the substantive limit of liability should be determined upon remand in advance of the proof of individual claims. A proceeding to limit liability is *ipso facto* a proceeding to limit recovery, and the amount of the applicable limit, like the value of the vessel and freight, is a question affecting the magnitude of the res from which recovery is sought. It is a question, therefore,

> which lies at the threshold of all claims, is equally relevant to all, and should accordingly be disposed of before any. 336 U.S. 386 , 398

There are several important distinctions between *Black Diamond* and this case.

1. The choice of law question in *Black Diamond* would determine the size of the fund without consideration of the merits of individual claims, and affect important LOLA issues such as the adequacy of the bond and release of any impounded vessels. The court made that the focus of its admonition by saying that the choice of law question would affect the "magnitude of the res". In our case, the magnitude of the res is forever fixed at the nominal value set with the vessel at the bottom of the ocean.

2. DOHSA does not establish a limit on liability *per se* but rather a limit on who may make claim and for what. Unlike the fixed limit involved with a statute that sets a formula or arbitrary cap, the amount still remains uncertain until a fact-specific inquiry is made. Thus, it does not lend itself to threshold determination and does not affect all claimants simultaneously unless they happen to be identically situated on the special facts of their claims.

3. *Black Diamond* involved no issue of tension between LOLA and the saving to suitor's clause. Thus, there was no need to strike a balance between the jurisdiction of the

LOLA court and any other.

4. Even if there had been saving to suitors issues, because of the multiple claim aspects and the need for concursus, saving to suitors jurisdiction would have been required to give way to admiralty jurisdiction, again making balancing of rights and sensitivity to forum unnecessary;

5. The substantive law in *Black Diamond* involved a choice of limitation laws: the Belgian scheme which would have reduced the potential recovery for all claims to an amount less than the value of the ship versus American law which would not. The choice of law issue involved in *Black Diamond* was purely a legal question, as distinguished from this case, in which the law to be applied involves mixed questions of law (interpretation of DOHSA) and fact (where the vessel sank). To the extent that the place of the sinking is a jury-submissible issue, it implicates precisely the right granted a claimant under the savings to suitor's clause to be in state court.

6. In *Black Diamond*, the courts below believed that a determination that Belgian law applied would effectively end the case in a single stroke. However, in this case the district court ruled on DOHSA issues in two steps. In its ruling of March 14, 1996, the petitioner had not asked for a ruling on claimant's survival claims, conscious pain and suffering endured by the decedents prior to their demise. The district court specifically excluded that issue from

consideration in its opinion and order. (Appendix, pp 36a-37a.) Thus, the petitioner never argued, the court never believed, and it was not in fact the case that resolution of that issue would potentially have terminated the LOLA action. Even in the second phase, though the claimant had conceded that as a *practical* matter, the economic loss claims were insignificant, they had not been formally stipulated out of the case. Since the value of the ship had been set at a stipulated amount of only $500, even the costs which would have been taxable to the claimant had he prevailed, for such matters as filing fees, witness and transcript fees, would have exceeded the value of the fund and therefore would have made continuation of LOLA jurisdiction technically necessary.

In short, the distinctions between *Black Diamond* and this case outweigh the similarities. Furthermore, if *Black Diamond* were carried to the lengths suggested by petitioner, the LOLA court, even *after* having determined that the case was to be returned under *Langnes* to state court, could make any number of decisions pertinent to the potential recoveries, such as statute of limitations, determination of heirs, dependency, types of damages recoverable, waiver, release, accord, satisfaction and a host of other purely legal questions loosely fitting under the heading "law to be applied."

CONCLUSION AND RELIEF SOUGHT

The claimant contends that the petitioner presents a

case that does not merit certiorari. Its issues are not new and the circuits are not split. The more important questions arising from this case are presented in our conditional cross-petition. They have to do with whether this proceeding, or any LOLA matter involving allegations of actual rather than vicarious fault against an owner, should be allowed to proceed as a device for undercutting saving to suitors jurisdiction. We understand that, as a conditional cross-petition, ours cannot be granted unless this one is. We ask that either both be denied or that both be granted. The one result which would be most unfortunate would be if the Court chose to grant consideration to the rather routine issues raised here and deny review of the more fundamental LOLA questions as to which there is a marked split in the circuits.

Respectfully submitted,

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